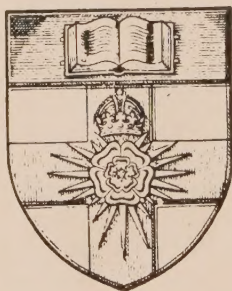


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THE IRISH REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE CHANCERY DIVISIONS

OF

THE HIGH COURTS OF JUSTICE

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN THE IRISH FREE STATE

AND

IN NORTHERN IRELAND.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1923.

VOL. I.

CHANCERY DIVISIONS AND LAND COMMISSION.

DUBLIN :

PUBLISHED BY THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

1923.



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Lords Justices of Appeal.

(IN THE IRISH FREE STATE.)

THE RIGHT HON. STEPHEN RONAN.

THE RIGHT HON. JAMES O'CONNOR.

(IN NORTHERN IRELAND.)

THE RIGHT HON. WILLIAM MOORE.

THE HON. JAMES ANDREWS.

Chancery Division.

(IN THE IRISH FREE STATE.)

THE RIGHT HON. CHARLES A. O'CONNOR M.R.

THE RIGHT HON. JOHN BLAKE POWELL.

(IN NORTHERN IRELAND.)

THE HON. DANIEL MARTIN WILSON.

Irish Land Commission.

THE HON. WILLIAM E. WYLIE.

Attorney-General.

(IN THE IRISH FREE STATE.)

HUGH KENNEDY K.C.

(IN NORTHERN IRELAND.)

THE RIGHT HON. RICHARD BEST K.C.

[These Reports will be cited as follows :—[1923] 1 I. R.]

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(IN THE IRISH FREE STATE.)

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HUGH J. M'CANN, }

Master of the Rolls, . . . ROBERT RICE, . . . Barrister-at-Law.

Mr. Justice Powell, . . C. NORMAN KOUGH, Barrister-at-Law.

Irish Land Commission, { T. C. TOBIAS, . . . } Barristers-at-law.
 { HECTOR HUGHES, . . . }

(IN NORTHERN IRELAND.)

JAMES M'CONNELL, Barrister-at-Law.

ERRATA.

Page 5, at end of line 5, add "c. 4".

,, 18, line 9, for "Ray" read "Kay".

,, 18, transpose lines 32 and 31.

MEMORANDUM.

The Right Hon. John Blake Powell, Justice of the High Court of Justice, Chancery Division, died on 13th September, 1923.

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DETERMINED BY

THE CHANCERY DIVISIONS

OF

THE HIGH COURTS OF JUSTICE,

AND ON APPEAL THEREFROM IN

THE COURTS OF APPEAL

IN

THE IRISH FREE STATE AND IN NORTHERN IRELAND

AND BY

THE IRISH LAND COMMISSION.

1923.

IN THE MATTER OF THE ESTATE OF GEORGE GOUGH
COBDEN.

(E.C. 6071.)

*Land Com.
Wylie J.*

1922.

June 30.

Tenant for life and remainder-man—Expenditure by tenant for life on improvements—Salvage—Recoupment out of capital moneys.

To entitle a tenant for life to recoupment out of capital moneys of sums expended by him on improvements, such expenditure must be in the nature of salvage payments, necessarily made to save the estate from actual danger of destruction; for example, money expended to prevent an immediate breach in a sea-wall and consequent flooding.

Money spent on ordinary improvements or current maintenance does not come within the rule; and it is immaterial that the Estates Commissioners insist on such improvements as a condition precedent to a sale under the Land Purchase Acts.

OBJECTION to final schedule of incumbrances.

George Gough Cobden, the vendor in the matter, was tenant for life of the Ballykeefe estate, Co. Limerick, consisting of flat, low-lying lands, bordering on the tidal waters of the River Shannon, and

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 COBDEN'S
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consequently exposed to flooding. The lands had been for nearly a century protected by an embankment, which had fallen more or less into disrepair. On the negotiations for a sale of the estate to the tenants, the Estates Commissioners made the following ruling, dated 19th December, 1918 :—"Before considering the question of declaring the lands included in the originating application in this matter to be an estate for the purposes of the Irish Land Act, 1903, the Commissioners desire to be informed whether the vendor is prepared to carry out the improvement works on the embankments referred to in copy specification which is sent herewith, and to lodge with the public trustee a sum of money to provide a fund for the future maintenance of the embankments." Pursuant to this ruling the tenant for life expended a sum of £3,268 4s. 3d. (which included engineers' fees) on facing, widening, and cresting the embankments, cutting and trimming the catchwater drains, substituting two new timber box sluices for sluices that had become decayed and unserviceable, enlarging and repairing the existing boxes of four other sluices, and constructing a complete new timber box sluice, with a new discharge channel to connect with the Ballynaclogh River (a tributary of the Shannon). The tenant for life claimed to be recouped out of capital money the sums so expended, together with a sum of £800 which he had lodged to a separate credit in the purchase matter to provide for the future maintenance of the embankments, and contended that these claims took priority over the mortgages and other charges on the inheritance.

Longfield, for the tenant for life :—

As between the tenant for life and the persons interested in remainder, the expenditure is on improvements authorized by the Settled Land Act, 1882, the analogy of which applies here: see sect. 25 (iv) and (v) of that Act; but in the circumstances in which this estate was situated, the claim is for a salvage charge, and it thus has priority over the charges on the inheritance, though they are paramount to the settlement creating the life estate.

This salvage claim rests on two grounds. First, the expenditure had the effect of preserving the lands physically from inundation, by which they would have been rendered wholly or largely valueless. Secondly, the expenditure enabled the inheritance to be sold, and in effect created the fund which is now to be distributed by the Court, for it would probably have been impracticable to sell these lands otherwise.

There is a clear exposition of the law of salvage in the judgment of Lord Justice Holmes in *In re Power's Policies* (1); and it is submitted that the claim of the applicant fully answers the tests laid down by the learned Lord Justice.

In re Cartright, *Avis v. Newman* (2); *Neill v. Neill* (3); and *In re Ferguson* (4) were also referred to.

(1) [1899] 1 I. R. 6.
 (2) 41 Ch. Div. 532.

(3) [1904] 1 I. R. 513.
 (4) 17 L. R. Ir. 552.

Charles Murphy, for incumbrancers :—

Our mortgage is prior to the settlement under which the vendor is tenant for life, and his claim is only admissible against the subject-matter of the settlement—viz., the equity of redemption. If this was a sale under the Settled Land Acts, no capital moneys would come to the hands of the trustees, so as to be applicable for alleged improvements, as the charges would have to be paid off in the first instance. No case has been cited in which a tenant for life has been held entitled to a salvage payment. The affidavit of the vendor's agent shows that the payments were made, not for the benefit of the inheritance, but in order to induce the Estates Commissioners to declare the estate one fit to be sold, and thus enable the vendor to capture the bonus. My clients were not consulted, and they had not called in their mortgage. The affidavit of the surveyor shows that all the expenditure was for the repair of existing works or the substitution of new sluices for decayed ones. A salvage claim can only be allowed for expenditure which prevented the immediate destruction of the property, but not for expenditure to prevent possible damage in the future. The only claim that can possibly be allowed as a salvage payment is the £200 for repairing the sudden breach in the embankment. I do not object to the retention of the £800 to provide for future repairs, as this is in the nature of insurance against future damage.

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*In re
Cobden's
Estate.*

WYLIE J. :—

This is an application to repay out of capital moneys the expenditure of a tenant for life on the settled estate.

The law is well settled. No such repayment can be authorized unless the circumstances amount to salvage—i.e., the preservation of the property from total or partial loss, the payment to be made by a person interested, and voluntarily. It is not sufficient that the income of the property may be increased by the expenditure, or that it was a prudent thing to do: *Re Montagu* (1). The question of fact in each case is: was the expenditure necessary to preserve the property? Improving a house already capable of being let would not be within the rule; preserving a house from becoming quite unfit for letting would be. Mr. Longfield admits that he must prove salvage or fail, and he puts his case in two ways. He says—first, this expenditure was necessary to save the property from loss, and was made for that purpose. Alternatively, he says the expenditure was made to effect a sale, and that in itself amounts to salvage, as the property could not otherwise have been sold under the 1908 Act. I do not think the latter argument is sound in law. As events have happened it was wise to sell, but I do not think the prudence of that decision can turn the payments made in carrying it out into salvage payments. I hold that the vendor must prove that the payments were necessarily made to save the estate from actual danger of destruction, or fail in his application.

I now turn to the evidence. The first affidavit before me is that of Mr. Rochford, filed 18th April, 1922. Nowhere in that affidavit is

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the suggestion made that the expenditure was made to save the estate from loss, or that there was imminent danger of a breach in the sea-wall. For all the evidence to the contrary in that affidavit, the estate might have gone on in the same way as of old—never well drained, but never useless. Indeed, Mr. Rochford in paragraph 9 deliberately submits that the reason for the expenditure was to effect a sale, thereby destroying to some degree the suggestion now put forward that it was to save the property from the sea. This was the only affidavit before me when the case was first opened. If I had decided the matter then, I would have had no option but to dismiss the application with costs.

Since then I have had the opportunity of seeing the Estates Commissioners' inspector's reports, and a further affidavit by the engineer for the vendor has been filed. I was anxious to see the reports in order that I might ascertain whether the requisition of the Estates Commissioners (the fulfilment of which would enhance the security for the advance) was made because their inspectors thought there was danger of a breach, or because the existing drainage system was deficient as a drainage system. I need not go through them in detail. Suffice it to say that I am satisfied that, while a great part of the work was required for the purpose of providing a better drainage system, some of it was necessary to prevent an immediate breach and consequent flooding. The engineer's affidavit confirms this view, particularly in one striking instance. The surveyor's report states that at one point there was an immediate danger of a breach. In 1920, according to the affidavit of the engineer, a breach actually occurred at that very place. Two sluices were also apparently irreparable, and would have had to be replaced, even if there had been no land purchase negotiations. All the rest of the work is, in my opinion, either the improvement of the drainage or ordinary maintenance, which should not be allowed.

I allow £750 for the new sluices, £200 for the repair of the sudden breach, and £100 engineers' fees—£1,050 in all. Mr. Murphy very fairly admits the £800, which is the fund for future maintenance.

One thing I wish to make clear. It is not, in my opinion, sufficient for a tenant for life to come in here and say, "I obeyed a requirement of the Estates Commissioners, and therefore I must be allowed the amount as a capital expenditure against the remainder-man." In each case, in my opinion, he must prove salvage in fact.

Solicitors for the vendor: *Moore, Keily, & Lloyd.*
Solicitor for the mortgagees: *B. M. O'Grady.*

T. C. T.

THE KING (CHILDERS) *v.* THE OFFICER COMMANDING THE TROOPS, PORTOBELLO BARRACKS, IN THE COUNTY OF DUBLIN, AND THE ADJUTANT-GENERAL OF THE FORCES OF THE IRISH PROVISIONAL GOVERNMENT. M. R.
1922.
Nov. 20, 21,
22, 23.

Habeas Corpus—State of war—Irish Free State (Agreement) Act, 1922, 12 Geo. 5—Interpretation—Powers of the Irish Provisional Government—Military Courts—Jurisdiction.

C. was arrested and charged with committing an offence "in that he on the 10th day of November, 1922, without proper authority, was in possession of an automatic pistol when apprehended by a party of National forces." This charge was investigated by a military Court assembled at Portobello Barracks, but no sentence was promulgated. On application for a writ of habeas corpus:

Held, that the writ must be refused, as a state of war being proved, the military, to whom the duty of repelling force by force was committed, were the sole judges of how it should be exercised. *Egan v. Macready* ([1921] 1 I.R. 265) distinguished.

MOTION ON NOTICE for an order that a writ of habeas corpus do issue directed to the officer commanding the troops at the Portobello Barracks, in the Co. Dublin, and the Adjutant-General of the forces of the Provisional Government, commanding them to have before the Court the body of Erskine Childers, the prosecutor, with the reasons for his detention.

The facts and circumstances of the case are set out in the affidavit of the solicitor for the prosecutor as follows:—

1. I am solicitor for the plaintiff in this action (1).

2. I acted for the said plaintiff in connexion with the charge which was preferred against him by the defendants and others, describing themselves as the military authorities of the army of the Irish Provisional Government, for having, as alleged, committed an offence, in that he at Annamoe House, Co. Wicklow, on the 10th day of November, 1922, without proper authority, was in possession of an automatic pistol when apprehended by a party of the National forces. I beg to refer to charge sheet and summary of evidence which were supplied to the plaintiff before the alleged crime hereinafter referred to, and upon which, fastened together and marked "A," I have written my name before swearing hereof.

3. The said charge was investigated by three gentlemen, purporting to be a military Court, assembled at Portobello Barracks, in the County of Dublin, on the 17th day of November, 1922. I attended before the said alleged Court, and instructed counsel, Messrs. Patrick Lynch K.C., Michael Comyn K.C. and Conchubhar A. Maguidhir B.L., who were also present.

4. Counsel on behalf of the plaintiff objected to the jurisdiction of said alleged Court or tribunal, and placed their objections in writing upon a true copy whereof, marked "B" and "C" respectively, I have written my name before swearing hereof. The originals of the said

(1) An action was also instituted in the Chancery Division by the prosecutor as plaintiff, claiming an injunction, in which this affidavit was sworn and filed.

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objections were handed to and received by the said tribunal; and one of the members thereof said that he would accept them, and attached them to the record of the proceedings.

R.
(CHILDERS)
v.
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GENERAL
OF THE
PROVISIONAL
FORCES.

5. There was a further objection handed in by the plaintiff, and similarly dealt with by the said tribunal. I beg to refer to a true copy thereof, marked "D," on which I have written my name before swearing hereof.

6. All of the said objections were overruled by the said tribunal and counsel, and this deponent then withdrew and took no further part in the proceedings.

7. I gathered from the observations of the members of the tribunal, and from what occurred when I was leaving the place in which the tribunal sat, that they intended to proceed, and did proceed, with the trial of the plaintiff after we withdrew. It was suggested to the counsel for the plaintiff by the tribunal, when counsel were discussing said objections, and afterwards when the tribunal was giving its decision, that as they considered they had no power to deal in any way with the said objections, and were simply, as they said, a committee of officers convened for a special purpose, namely, to try the case, the validity of the said objections which were urged on behalf of the plaintiff should be questioned, if at all, in the civil Courts.

8. The public and press were excluded from the whole of the said proceedings, and I have no knowledge of what took place after counsel and myself withdrew, and I am not therefore in a position to inform this Court what subsequently took place; but, as this is one of a series of cases, and the only one in which I have been supplied with the names of the persons tried, although I have asked for and have not been supplied with their names or any of them, I have grave apprehensions for believing that if this Court does not interfere in this case, the plaintiff's life and the lives of the other persons who have been dealt with by such Courts, in so far as they still survive, may be forfeited by decisions of these tribunals, which I charge and believe were illegally constituted, and were acting contrary to law. I say that the plaintiff personally charged me not to institute any such proceedings as this action unless they were brought in such a way as to be available for the other prisoners who have been dealt with by the said alleged Courts. My instructions to act on behalf of the plaintiff in this action were expressly conditional on my undertaking to him that I would bring them in such manner as to enure to the benefit of others in the like case.

9. I beg to refer to copies of the "Iris Oifigiúil," dated the 31st day of October, 1922, the 3rd day of November, 1922, and the 17th day of November, 1922; to a copy of "General Regulations as to the Trial of Civilians by Military Courts"; to a copy of "General Orders of the Army Council," dated the 1st day of November, 1922; to a copy of the "Irish Times" newspaper, dated the 16th day of November, 1922, containing a report of an answer by the Minister of Defence to a question by Deputy Darrell Figgis in the Provisional Parliament as to the trial of certain civilians or alleged civilians; and a copy of the "Evening Mail" newspaper, dated the 17th day of November, 1922, containing an official report of the execution of death sentences imposed by similar tribunals on four men, upon which, respectively,

marked "E," "F," "G," "H," "I," "K," and "L," I have written my name before swearing hereof.

10. On Wednesday, the 15th day of November, instant, Mr. Michael Comyn was informed by a military officer at Clondalkin, where he was attending an inquest, instructed by me, that the plaintiff wanted to see him, the said Mr. Comyn, and that the plaintiff was to be put on his trial before a military committee on Friday morning, the 17th day of November, instant. I accompanied Mr. Comyn to Portobello Barracks, and we were accorded an interview with the plaintiff, on signing an undertaking on our personal honour that we would not use the said interview otherwise than for the purpose of preparing the plaintiff's defence. After returning from the interview, the said Mr. Comyn, accompanied by me, interviewed the Judge Advocate-General, Mr. Cathbar Davitt B.L., and asked him for the names of the twelve men who had been tried by similar Courts, for the particulars of the offences of which they were charged, and of the places of their detention, which information the said Judge Advocate-General declined to give, but stated he would consider the matter and consult with the Adjutant-General, one of the said defendants, namely, Gearóid O Súilleabháin, and he also requested that I should put an application in writing and forward it to the said Adjutant-General. I beg to refer to a copy of letter, dated the 16th day of November, instant, which I wrote in pursuance of the said conversation and sent by post to the said Adjutant-General, upon which, marked with the letter "M," I have written my name before swearing hereof. I have received no reply to the said letter. I had a telephone conversation with the said Judge Advocate-General to-day, about 1.30 p.m., when I asked him for the information in question, and he promised to consult with the said Adjutant-General and communicate with me later and let me know if it would be furnished, and the said Judge Advocate-General subsequently telephoned me about 3.30 p.m., and informed me that this information would not be supplied.

11. At or about 10 p.m. on Friday, the 17th day of November, instant, I communicated with the offices of the Irish Provisional Government at Upper Merrion Street, and succeeded in getting into communication with the Law Adviser of the said Government, Mr. Hugh Kennedy K.C., whom I informed that I was advised by counsel to issue a writ, namely, the writ of summons herein, on the following morning, and to take steps to obtain the interlocutory injunction and writ of habeas corpus prayed for in the said writ, and that the proceedings were intended to be on behalf of the other prisoners mentioned in the reply to Deputy Darrell Figgis hereinbefore referred to, and of whose names I was unaware. I also requested the said Law Adviser to communicate with the said military authorities in order that they might not, as I apprehended, put into execution any further illegal sentences of such alleged Courts. The said Law Adviser stated that he was not the proper person to whom I should apply, and that I should communicate with the Chief State Solicitor.

12. I thereupon telephoned to Dublin Castle, and endeavoured to get through to the Chief State Solicitor's office, but failed to do so owing to their not answering on any of the three extensions, as I was informed by the telephone operator on duty, and believe. This occurred about 10.15 p.m.

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13. Immediately thereafter I telephoned to Beggars' Bush Barracks, and asked to be put through to the Judge Advocate-General's office, and a Captain Hodnett, who described himself as a legal officer, came to the telephone, and I informed him of my intention in the same terms as the said Law Adviser. The said Captain Hodnett undertook to convey my message to the proper authorities.

14. This morning, the 16th day of November, instant, I sent a letter by hand to the Chief State Solicitor, at or about 11 o'clock a.m., to which, marked with the letter "O," I have written my name on a copy of the said letter before swearing this affidavit.

15. In the conversation on the telephone which I had with the said Judge Advocate-General to-day, about 1.30 p.m., the latter personally undertook that no steps would be taken against the plaintiff until an opportunity had been afforded of bringing the matter before this Court.

The following objections were put in for the prisoner at the trial before the military Court, and overruled:—

As counsel for Mr. Erskine Childers, we object to his being tried before this tribunal on the ground that the tribunal is not legally competent to try him on the charge preferred against him, on the grounds:—

1. That there is no legal authority for the convening or setting up of this tribunal for the purpose of this trial or otherwise.

2. That it has been hitherto universally conceded by jurists in every civilized community that prisoners of war should not be tried by a tribunal selected from the opposing military forces; and such purported trials require an Act of indemnity to correct the illegality of the proceedings, and until such Act of indemnity is passed such so-called trials are contrary to law.

3. That in this country, in the case of Wolfe Tone (27 State Trials, 611), what is proposed to be done in the present case was held to be illegal.

4. That the law was similarly laid down in *Egan v. Macready and Others* (1), and that the law as laid down in that case must be accepted as correct, as the Crown forces did not proceed with the appeal, in which they could have questioned the decision.

5. That the defendant (2) is not a "civilian," and is not within the definition of the class of persons contemplated by the general regulations under which this tribunal purports to act, but is a staff captain in the Irish Republican Army, and that the said regulations are null and void.

6. That the said regulations purport to give this tribunal power to inflict penalties not authorized by law.

7. That there is no military necessity for the setting up of this tribunal.

8. Under the ancient law of Ireland, as under the natural principles of justice and the law of civilized nations, no soldier taken prisoner during hostilities can be tried or punished by a tribunal drawn from the ranks of his military opponents or enemies.

9. Under the resolutions of the International Red Cross Conference,

(1) [1921] 1 I.R. 265.

(2) Sic, prosecutor.—Ed.

1921, which have been accorded international recognition, it is laid down that in civil war political prisoners are entitled to be treated as prisoners of war.

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Captain Childers does not recognize the legality of the Provisional Government, and consequently does not recognize the legality of the Court which is set up under the supposed authority of the Government. He recognizes the authority only of the Irish Republican Government and army. He has been taken prisoner in war. He is an officer of the Irish Republican Army, and he claims that if he be detained a captive by an army whose legality he repudiates, he should receive the treatment of a prisoner of war. His own Government, the Irish Republican Government, has accorded to the troops of the Provisional Government, while not recognizing its authority, belligerent rights; and he demands reciprocity on behalf of himself and his fellow-prisoners.

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If there is anything contained in the objections made by counsel on my behalf which is inconsistent with the above declaration, or which could be construed as a recognition of any authority or Government in Ireland other than the Irish Republican Government, I hereby withdraw any such objection.—(Signed), Erskine Childers, Staff Captain, I.R.A.

An affidavit by the Adjutant-General of the National Army of Ireland stated as follows:—

1. For some time past grave disturbances and disorder have taken place throughout large areas of the country, and have been fomented by certain persons who are in political disagreement with the majority of the Irish people, and hostile to the Parliament and the Government of the people, which they are seeking to paralyze and overthrow by force of arms. These persons, who call themselves the Irish Republican Army, are working in the form of irregular military forces, into which have been collected not only political malcontents, but criminal and other dangerous adventurers. They have occupied many public and private buildings, which they have completely destroyed when compelled to evacuate them. They have frequently ambushed and attacked and continue from day to day to ambush and attack parties of National troops, and have killed and wounded many officers and men. They have assassinated and badly wounded soldiers moving about unsuspectingly or unarmed in small numbers.

2. Under the pretence of military requisition they have by force of arms robbed banks of large sums of money, and plundered public and private property. They shoot from house-tops, and throw bombs in the public streets. They have blown up or set on fire a great number of public and private buildings, military and police barracks, private mansions, and other houses. They have interrupted communications by demolishing bridges, tearing up railway lines, cutting wires, and blocking the roads. These things they continue to do from day to day for the purpose of terrorizing their fellow-countrymen and upsetting the Government. Generally an armed rebellion is being carried on throughout the country against the Parliament of the people and the Government which has the allegiance of the vast majority of the people.

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3. As showing the object and intentions of the persons engaged in the said armed rebellion, I beg to refer to copies of communications, dated respectively 25th July, 1922, 2nd August, 1922, 18th August, 1922, 27th August, 1922, 4th September, 1922, 5th October, 1922, from Liam Lynch, who is alleged to be the Chief of Staff of the said so-called Irish Republican Army, on which, marked with the letters A, B, C, D, E, F, I have signed my name before swearing hereof. The original communications are in the possession of the Army Council, and they have been inspected by me, and the copies so exhibited are true and accurate copies of the said original communications. I know the handwriting of Liam Lynch, and I say that the signature "Liam Lynch" to the said communications is in his handwriting. The original communications were in the possession of Ernest O'Maillie, who was alleged to be Assistant Chief of Staff of the said so-called army, and were captured when the said Ernest O'Maillie was arrested by members of the National Army at Ailesbury Road, in the County of Dublin, on the 10th day of November, 1922.

4. Ordinary police forces are not able to deal with the disorder referred to outside the City of Dublin; ordinary police forces are only in process of formation, and have not yet been fully organized. The sittings of the ordinary Courts have been interrupted in many parts of the country. The situation is one which can only be dealt with by means of military forces.

5. The disturbances and disorders aforesaid have continued to exist, and do exist at the present, in, amongst others, the counties of Dublin, Wicklow, and Wexford. In pursuance of the aforesaid armed rebellion, National soldiers have been continually attacked in the said counties. Unarmed officers leaving a church in Wexford were shot down in cold blood, and unarmed soldiers in the company of lady friends were fired upon. Ambushes have occurred from time to time, resulting in considerable loss of life. Buildings were mined in busy thoroughfares in Dublin City, and bombs thrown in crowded streets. On last Saturday evening an attempt was made to mine the public roadway near Inchicore, presumably with the object of ambushing National soldiers who were expected along this route. The mines were prematurely exploded, and resulted in the death of four of the men engaged in the operation, and the wounding of a number of other people, including two others, also engaged in the operation. In the Dublin mountains and other places men have been captured with arms, bombs, and other war materials in their possession. Even houses of the relatives of the National soldiers have been attacked in certain areas in Dublin and Wicklow; railway, telegraphic, and telephonic communication has been frequently interrupted; signal cabins have been destroyed over a wide area, and lines torn up. On the Dublin, Wicklow, and Wexford Railway lines trains have been frequently fired upon while carrying civilian passengers, and obstructions have been placed upon the permanent way. National posts have been periodically attacked with machine guns and rifle fire. These and similar activities are carried on from day to day in, amongst others, the said counties, with the object of reducing the country to a state of chaos, subverting the Government by force of arms, and rendering impotent the forces of peace and order.

6. In the circumstances aforesaid the Irish Government has charged the National Army, raised under its authority, with the task of suppressing the said disturbances, protecting the lives and property of the people, and duly restoring peace and order and normal conditions, and establishing the authority of the lawfully constituted Parliament and Government of the people.

7. On the 25th day of September last the situation was submitted to the consideration of Dáil Éireann, now in session, the Parliament to which the Provisional Government is responsible, whereupon that Parliament passed a resolution reciting, amongst other things, that the Government had sanctioned the setting up of military Courts for the purpose of inquiring into charges against persons in respect of the offences therein mentioned, and the inquiry by such military Courts into the cases of persons charged with any of the offences following, namely:—

“1. Taking part in or aiding or abetting any attack upon or using forces against National forces. 2. Looting, arson, destruction, seizure, unlawful possession or removal of or damage to any public or private property. 3. Having possession, without proper authority, of any bomb or article in the nature of a bomb, or any dynamite, gelignite, or other explosive substance, or any revolvers, rifle, gun, or other firearm or lethal weapon, or any ammunition for such firearm. 4. The breach of any general order or regulation made by the Army Council.”

The Dáil being of opinion that the doing by or under the authority of the Army Council of the matters aforesaid was a matter of military necessity, thereby ratified and approved of the sanction given by the Government, and of the doing by or under the authority of the Army Council of all or any of the acts and matters aforesaid. I beg to refer to a copy of the said resolution contained in the issue of the official gazette, “*Iris Oifigiúil*,” of the 3rd day of October, 1922.

8. In pursuance of the said authority, a proclamation was issued by the army authorities, dated 10th day of October, 1922, whereby it was announced and proclaimed that from and after the 15th day of October, 1922, the Army Council would exercise all the powers and do all the matters and things therein mentioned—namely, the setting up of such military Courts as aforesaid, and the trial by such Courts of persons charged with any of the offences aforesaid. I beg to refer to a copy of the said aforesaid proclamation contained in the issue of the “*Iris Oifigiúil*” of the 31st day of October, 1922.

9. The above-mentioned Erskine Childers, who is described by his solicitor in the affidavit sworn in this matter as a Staff Captain in the said so-called Irish Republican Army, was arrested at the residence of Mr. Robert Barton, Annamoe House, Roundwood, Co. Wicklow, on the 10th day of November, 1922, and was then in the possession of an automatic pistol.

10. In the circumstances above mentioned, and having regard to the condition of the country, the army authorities consider that it is a matter of military necessity and essential for the suppression of the disturbance aforesaid and the restoration of peace and order in the country that persons charged with the commission of offences coming within the said resolution and proclamation should be tried by military Courts, and this has been done in the case of the said Erskine Childers.

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11. For the foregoing reasons I submit on behalf of the military authorities that they should not be interfered with, and this Court should not during the operations necessary for the suppression of the rebellion, disturbances, and disorder aforesaid question the acts of the military forces, acting under the authority of the Provisional Government and duly elected Parliament (Dáil Éireann).

Lynch K.C. (with him *M. Comyn K.C.* and *Maguire*), for the prosecutor :—

The Restoration of Order (Ireland) Act, 1920 (10 & 11 Geo. 5, c. 31), is still in force. Any resolutions passed by the Provisional Parliament empowering the military to adopt a certain course, including the setting up of military tribunals, have no legal validity. Nothing can have any legal effect except a statute, which must have the assent of King, Lords, and Commons. The Treaty is not law; it has not received the sanction of the British Parliament, and until that is done it has no legal effect. This is plainly laid down by Lord Halsbury, vol. vi, p. 372: "No Act can be passed without the consent of the King." The new Stipendiary Courts could have dealt with the charge against Mr. Childers of having possession of firearms under the provisions of the Firearms Act of 1920 (10 & 11 Geo. 5, c. 43), the penalty being penal servitude for life in Ireland, or two years in England. While these Courts were open it was not legal to try him by a military tribunal. We rely upon *Egan v. Macready* (1).

Kennedy K.C., Law Officer to the Provisional Government (with him *T. Sullivan K.C.* and *John O'Byrne*), appeared for the military authorities :—

Mr. Lynch's difficulty is due to the fact that he has taken up a dual position. He came into Court for an Englishman to get the protection of the Court for that man, who proclaims himself an officer of the Irish Republic, and who recognizes only the authority of the Republican Government. One said that there was no war, and another said that he had been taken as a prisoner of war, and asked to be treated as a prisoner of war; and there being an armed rebellion, there is but one question—the military necessity of repressing force directed to the overthrow of the lawfully established Government, which is entitled to use force to repel force. The question of the degree of force necessary is not one which can be raised *durante bello*. The Restoration of Order (Ireland) Act, 1920, was passed to deal with a state of war between England and Ireland, and when that came to an end with the truce between the two nations confirmed in the Treaty, the Restoration of Order Act ceased to have any effect in Ireland. The present state of affairs is wholly different. The Government is now sought to be overthrown by an armed rebellion. Against that state of rebellion the Government has organized an army. That army cannot be brought within the Restoration of Order Act. *Egan v. Macready* (1) does not apply.

M. Comyn K.C. and *Maguire* replied for the prosecutor.

O'CONNOR M.R. :—

After the long and exhaustive arguments which I have heard from counsel for the applicant, I do not think that anything is to be gained by reserving my judgment. If I had any doubts as to what my decision should be, I would certainly do so. But I entertain no doubts, and there is nothing to be gained by any postponement. No one can say that the case has not been adequately dealt with. This prisoner, Erskine Childers, has had the advantage of the advocacy of eminent counsel, who have manifested a zeal and devotion to duty which uphold the best traditions of the Irish Bar. Their efforts in this public Court must excite the admiration of every person who heard them; but it ought to be known that before this public hearing, so impressed were they with the urgency of the case, they approached me on two occasions at my private residence in the late hours of the evening in their effort to procure the immediate issue of the writ for which they now apply. I felt myself unable on each occasion to grant their request, and the most I could do was to give liberty for the service of notice of motion on the officers of the Provisional Government to be heard on last Monday. I mention this early incident in the case because it illustrates the right of every subject of the King to apply at any time for the writ of habeas corpus, and bears further testimony to the zeal of counsel and the solicitor engaged in the case.

I will approach the case on the assumption that the existence of a state of war is traversed, but the evidence in proof is overwhelming. An affidavit was filed on behalf of the Provisional Government showing the appalling condition to which the country has been brought—so appalling as to present a picture which might well describe the seat of the great war between France and Germany. But if there was no affidavit at all, I would be bound to take judicial notice of the fact that for months this country has been enduring a state of war. I am sitting here in this temporary makeshift for a Court of Justice. Why? Because one of the noblest buildings in this country, which was erected for the accommodation of the King's Courts and was the home of justice for more than a hundred years, is now a mass of crumbling ruins, the work of revolutionaries, who proclaim themselves the soldiers of an Irish Republic.

I know also that the Public Record Office (a building that might well have been spared even by the most extreme of irreconcilables) has been reduced to ashes, with its treasures, which can never be replaced.

I know also that railways have been torn up, railway stations destroyed, the noblest mansions burned down, roadways made impassable, bridges blown up, and life and property attacked in almost every county in Southern Ireland. If this is not a state of war, I would like to know what is.

This is the condition of affairs which confronts me when I come to deal with this case, and I have first to ask myself is this state of things to be allowed to continue, and on whom devolves the duty of re-establishing peace and order, and saving the country from utter destruction? Plainly this duty falls upon the Government—whatever that Government may be—whether it be merely provisional or finally constituted. Whatever character it bears, the salvation of the country depends upon it.

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The Government is for the time being in a state of transition. We have what is called a Provisional Government pending the completion of the constitution of the Irish Free State; but, although the Government is only provisional, it has been formally and legally set up, and its authority cannot be questioned. It derives its validity from the Treaty between Great Britain and Ireland and the Act of Parliament confirming it. The first section of that Act declared that it should have the force of law as from the date of the passing of the Act, viz., the 31st March, 1922.

The Provisional Government is now *de jure* as well as *de facto* the ruling authority, bound to administer the law, to preserve the peace, and to repress by force, if necessary, all persons who seek by violence to overthrow it. Those duties carry with them the right to organize an army for the protection of the people in any case of emergency. It is a right inherent in any Government. No Government can exist unless there is some physical force behind it. This gets rid of a technical point made by Mr. Comyn against the validity of a resolution passed by the Dáil—which is the Irish House of Parliament. He contended that it had no legal force and effect because it was not a statute, but independently of any statute the executive Government is bound to protect the subjects of the State from aggression.

The present unhappy state of affairs has been brought about by a party who have raised an insurrection against the Provisional Government as constituted by law. This party has raised an army called the Irish Republican Army, and by means of it they are seeking to overthrow the existing Government, and to replace it by an Irish Republic. The result has been the reduction of the country to a state of chaos.

For the purpose of suppressing this rebellion and restoring order, the Provisional Government has been obliged to employ its army. Force must be met by force, and violence by violence; and once an army is set in motion—once a state of war has been established—the rough and ready methods of warfare must be adopted, and take the place of the precise and orderly methods of civil government. The ordinary law is silenced by the sound of the pistol-shot and the bomb. *Inter arma silent leges* is a maxim two thousand years old, and has come down to us from the Romans. *Suprema lex, salus populi* must be the guiding principle when the civil law has failed. Force then becomes the only remedy, and those to whom the task is committed must be the sole judges how it should be exercised.

Erskine Childers, on whose behalf the writ of *habeas corpus* is sought, comes into Court proclaiming himself to be a soldier of the Irish Republic. He maintains that this is the only lawful authority. He was captured by members of the army of the Provisional Government with a revolver in his possession, and he is now in custody. He has been tried and convicted by a tribunal which is not a Court of justice, but apparently no sentence has yet been pronounced. He disputes the authority of the tribunal, and comes to this civil Court for protection, but its answer must be that its jurisdiction is ousted by the state of war which he himself has helped to produce.

However doubtful the law may have been in the past, it is now clearly established that once a state of war arises the civil Courts have no jurisdiction over the acts of the military authority during the

continuance of hostilities. The matter has been so recently and frequently discussed, I do not consider it necessary to do more than refer to *Marais' Case* (1), *Tilenko's Case* (2), and *Allen's Case* (3). The Restoration of Order Act, without express legislation, is not adaptable to the Irish constitution as it is provisionally established. I must, therefore, hold that the decision in *Egan v. Macready* (4) does not apply to the present case.

Reliance was placed on my own decision in *Egan's Case* (4), but that turned entirely on the effect of the Restoration of Order Act, 1920, which in my opinion controlled the action of the military authority. But that Act has no application to the circumstances of the present time. It applied only to the British Army as constituted and regulated by the Army Act. This can be easily seen by reference to sect. 1, sub-s. 2 (b), of the Restoration of Order Act, which provides that a Court-martial authorized by the Army Act shall include a member nominated by the Lord Lieutenant, and certified by the Lord Chancellor of Ireland, or by the Lord Chief Justice of England. But a Court-martial, constituted under the English Army Act, finds no place in the army of the Irish Free State, and the Lord Chief Justice of England has no authority under the Treaty to interfere in the affairs of this country.

The further point has been made that so long as the civil Courts are open, their jurisdiction cannot be invaded by military tribunals, and it was urged that the Courts were open, notwithstanding the state of war, as is proved by the very fact that I am now sitting here and adjudicating in the present matter. Now, if the Courts were open and freely functioning as in times of peace, that would go largely to show that there was not really a state of war. But how is the Supreme Court functioning now? Only under difficulties which, were it not for the courage and devotion to duty of its officers, would have been insurmountable. Can the Court be said to be freely functioning when it requires the protection of a military guard, when the circuits of the Judges are interfered with, and when some of the County Court Judges dare not enter their districts? I would like to know what would be the display of military force which would be required if Erskine Childers or any other prominent member of the I.R.A. was brought to trial in Green Street? The truth is that the Courts are just struggling for continued existence in the state of war which is now prevailing. They are not functioning as in times of peace.

I am bound to refuse the application for a writ of habeas corpus.

Solicitor for the prosecutor: *John Woods*.

Solicitor for the Provisional Government: *The Chief State Solicitor*.

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(1) [1902] A. C. 109.
(2) [1907] A. C. 93.

(3) [1921] 2 I. R. 244.
(4) [1921] 1 I. R. 265.

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IN RE JOHN M'CLEARY, DECEASED. MOFFAT v. M'CLEARY (1).
(1922. No. 75.)

April 3.
Nov. 14.

Will—Construction—Condition subsequent—"Come to live"—Uncertainty.

A testator bequeathed the residue of his property to his brother Alexander, at present residing in I., New Zealand, provided that he or any of his sons came to live at M. within one year after the testator's death, and in the event of Alexander or any of his sons not so coming to live at M., he bequeathed said residue to his brother Aaron.

Held, that the condition as to residence was too vague to be enforced, and was void for uncertainty, and that Alexander was entitled to the residue of the estate absolutely.

ORIGINATING SUMMONS.

John M'Cleary made his will, dated 17th January, 1920, as follows:—"I bequeath to my brother Alexander M'Cleary, at present residing in Invercargill, New Zealand, provided that he or any of his sons come to live at Magherahan within one year after my death, the residue of all the property of which I may die possessed. In the event of the said Alexander M'Cleary or any of his sons not so coming to live at Magherahan as aforesaid, I bequeath said residue to my brother Aaron M'Cleary." The testator died on the 8rd November, 1920, without having revoked or altered his will. Probate was on 31st March, 1921, granted to John Moffat, an executor. Under an earlier will of another brother (Robert M'Cleary) Alexander was already entitled to the farm at Magherahan on the death of John M'Cleary, the above testator.

The plaintiff, John Moffat, brought the present summons for the determination of the following questions:—

1. Whether on the true construction of the will Alexander M'Cleary has fulfilled the conditions of the will?
2. Whether the residuary legacy given by the will is presently payable to Alexander M'Cleary?
3. If not, then to whom is the said legacy and the income thereof presently payable?

E. J. McKean, for the executor.

Begley K.C., for the defendant, Alexander M'Cleary:—

The condition that Alexander M'Cleary or any of his sons should come to live at Magherahan within one year after the death of the testator had been fulfilled: *Arbib and Class's Contract* (2). Even had the condition not been fulfilled, on the authority of *Fillingham v. Bromley* (3) and *Walcott v. Botfield* (4), it is void for uncertainty.

(1) Before MOORE L.J., sitting for WILSON J.

(2) [1891] 1 Ch. 601.

(3) Tur. & R. 530.

(4) Fay's Reports, 534.

In these cases it was held that a condition as to residence, where no period for residence has been fixed, is too vague to be enforced.

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W. Lowry, for defendant, Aaron M'Cleary :—

The condition is valid and binding, and is a condition relating to the residue. Alexander or his sons, as a condition of taking the residue, must reside. Cases dealing with conditions annexed to realty do not apply.

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MOORE L.J. :—

This was an originating summons brought by John Moffat as executor of the will of John M'Cleary, deceased, for the determination of the following questions arising in course of the administration of the estate of the deceased. [His Lordship read the questions (ante, p. 16).]

John M'Cleary, the testator, made his will on January 17th, 1920, of which the following is the material clause so far as the present application is concerned. [His Lordship read the clause in the will (ante, p. 16).]

The testator died on November 3rd, 1920, and Alexander M'Cleary returned to Ireland in October, 1920, and has been living at Magherahan ever since. It may be mentioned that under an earlier will of another brother (Robert M'Cleary) Alexander was already entitled to the farm at Magherahan on the death of John M'Cleary, the above testator.

After the case had been fully argued before me, I discovered that the entire subject-matter of the application was situate outside the jurisdiction of this Court, and I declined to make a declaratory judgment not enforceable by this Court, in Southern Ireland, without further argument. However, that difficulty has now disappeared, because the executor has brought into Court a deposit receipt for £775, the property of the testator, to abide any decree which may be made.

There are two questions to be answered in the present case: Is Alexander M'Cleary now absolutely entitled to the residue, because, on the facts, he has sufficiently complied with the terms of the condition in the will? Or, alternatively, are the terms of the will binding in law or too vague, and therefore bad for uncertainty, and consequently to be rejected?

Dealing with the first question, and therefore assuming the condition to be valid, has it on the true construction of the will been sufficiently complied with? The proviso is that Alexander is to have the residue, "provided that he . . . come to live at Magherahan within one year after my death." Alexander did so. If he had not done so, "in the event of his not so coming to live at Magherahan as aforesaid," the gift over took effect. It is now contended that he must continue to live there for the term of his natural life. If the words were that "in the event of Alexander ceasing to live at Magherahan," the gift over took effect, then the case of Aaron would be clear. But I cannot give effect to a construction which is not what the testator has expressed.

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I think in this view the case resembles *Arbib and Class's Contract* (1). In that case B, then residing in Australia, was appointed an executor and trustee "if and when he shall return to England." B did come back to England, and stayed there for six months. The question arose as to the title of B to sell as trustee. It was argued that the will intended him to return to England to live there. North J. held he was not bound to continue to live in England; that six months' residence gave him title; and this decision was affirmed on appeal by Coleridge C.J., Lindley and Ray L.JJ. If then the proviso is valid in law, I hold that Alexander M'Cleary has sufficiently complied with it, and that he is now entitled to the residue absolutely.

Dealing, however, with the second question, if the proviso is bad in law for uncertainty, then quacunque via Alexander is absolutely entitled. The first case cited was *Fillingham v. Bromley* (2), which was a suit for specific performance. The question was whether or not the plaintiff had made title. There Rendock Neale, by his will of 18th November, 1768, devised his estate of Juts in settlement to his nephew, Rendock Neale, for life; after his death to his first and other sons in tail male, with remainders over. The will contained a proviso relating to each successive tenant in possession under the settlement, directing "every such person or persons should live and reside at Juts, and in default thereof the devise went over to the next in succession, as if the person refusing or neglecting to reside had been actually dead." The question arose whether on the facts there had been a forfeiture under the terms of the devise. It was referred to the Master, who stated the evidence. It appeared that at the death of the testator the nephew was a minor. For two years after he attained the age of twenty-one years he was living and residing at Juts, and so described himself. He then went into Nottinghamshire, where he remained about a year, when he returned to Juts with his wife, whom he had were there on board wages. After he returned to Juts, he continued married in the interval. Whilst he was absent from Juts his servants to live and reside, and describe himself as living and residing there for about another year, when for the purpose of his wife's confinement he again went into Nottinghamshire. From the time of his quitting Juts on that occasion he ceased to describe himself as living or residing there. He, however, occasionally went there for a few weeks or months, sometimes with his family and establishment, sometimes without. At all times he kept two or three servants at Juts on board wages, and was assessed to poor-rate as occupier. The Master reported against a forfeiture. The Vice-Chancellor decreed specific performance. The defendant appealed, and it came before the Lord Chancellor, of whose judgment I quote only the material portions: "There is great difficulty in saying that a forfeiture was incurred when the Court cannot see clearly what it was the testator meant. . . . Then comes the question, 'What is living and residing?' Occupation is not living and residing. There are many purposes for which the word 'inhabitant' has been taken to include persons as inhabitants of places in which they never were. The question comes to this: what was it the testator meant; and whether, unless a clear meaning can be put upon the will, the Court is to take upon itself to say there has been a

forfeiture." The Lord Chancellor held the title good, and affirmed the Vice-Chancellor's decree.

Walcot v. Botfield (1) was a case where Vice-Chancellor Page-Wood held that under the terms of a devise, when the devisee was bound to reside at the mansion-house for defined periods in each year, personal residence, and not merely the keeping up of an establishment, was necessary. *Fillingham v. Bromley* (2) was cited. Page-Wood V.-C., having stated the limitations in the will, and having referred to a proviso prior to the one which was the subject of decision, read the provisos which raised the question of residence, and proceeded: "The question is whether or not in effect the whole direction as to residence—looking to the various authorities, and especially to the case of *Fillingham v. Bromley* (2), which decides that a direction of this description as to residence, with a clause of forfeiture in the event of non-residence, is a direction to be strictly construed—is so vague and indefinite that it is impossible to give it any effect, and therefore the whole limitation must be disregarded. It was argued first that the term 'residence' was entirely vague: *Fillingham v. Bromley* (2); and it was then argued that if the meaning of the word 'residence' be so doubtful, fixing a period for such residence cannot alter the case. I think this is the first fallacy of the argument. A great part of the difficulty in these cases has arisen from no time being limited for the residence required, and Lord Eldon put a question which shows the difficulty that occurs when no specific period for residence is pointed out. He asked: 'Suppose he had been a member of Parliament, and had had a house in London, would you have said that he did not live and reside at Juts?'" . . . "But 'residence' implies in all cases personal presence in the locality at some period or other, and the real difficulty in a direction of this kind arises from the absence of any limitation of the time for such residence. If a person is directed to reside at a certain house, and it is not said for how long, it may be contended that he should be there all his life, or if he constantly keeps up an establishment there, it may be agreed to be sufficient if he goes there only once in his lifetime; but to say that a person can be resident in any sense who has never been personally present at the place would be an entire contradiction of the terms employed. The whole will appears to me to be carefully penned so as to tie down the devisee when of full age to a personal residence at this house during a certain period in each year."

There are two other cases, the gift being to persons who were required "to be in England" at the time of the decease of the respective testators, where it was held that temporary absence did not disentitle the recipients: *Woods v. Townley* (3), *Salé v. Atkinson* (4). In the latter case the donee was absent discharging a ship at Belfast, but the Vice-Chancellor (again Page-Wood) held that he was residing in England notwithstanding. I do not think that these cases are of much assistance. Nor has the Irish case—a converse one—of a forfeiture if the donee returned to this country, *Orpen v. Moriarty* (5), decided by Barton J., much bearing on the question. The most important authority is *Noel v. Sandbrook* (6), where the cases to date are considered by Parker J. He held that the condition so attached to

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(1) Kay, 534.

(2) Tur. & R. 530.

(3) 11 Hare, 314.

(4) 3 Jurist (N. S.), 41.

(5) [1912] 1 I. R. 485.

(6) [1912] 2 Ch. 471.

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the gifts was bad as contrary to public policy as restraining the father from doing his duty to the children, and went on, "I am also of opinion that the condition itself is bad for another reason. It appears to me to be bad on the ground of uncertainty; for, as has been laid down by the House of Lords in *Clavering v. Ellison* (1), conditions subsequent in order to defeat vested estates or cause a forfeiture must be such that from the moment of their creation the Court can say with reasonable certainty in what events the forfeiture will occur. Now, in the present case the forfeiture is to occur in several events, the first of which is if either or both of these grandchildren shall live with their father. It appears to me that the expression, 'to live with their father,' is exceedingly vague; and it is difficult for me . . . to arrive with certainty at any conception of the event which would cause the forfeiture. It seems to imply a certain degree of permanence of residence. Take, for instance, what I said just now. Suppose I were to direct the children to live with their father at the seaside during his furlough, say for a couple of years or one year, I should hesitate to say that that was living with the father within the meaning of this will. Supposing the father got an extension of leave, and during the extension of leave I sanctioned their living with him again, would that make any difference? Ultimately the father might be sick and unable to go back, and they might stay on and nurse their father—would that be living with him? It would be impossible to say at what point the living with their father became living of such a nature that the forfeiture as contemplated by this will occurred. That, I think, brings the case within the precise circumstances dealt with in *Clavering v. Ellison* (1), where the condition was that the children should be educated in England, and the question was what amount of residence abroad and what tuition abroad would prevent their being educated in England within the meaning of the condition. One, at any rate, of the noble Lords responsible for the decision came to the conclusion that that being so the condition was too vague to be enforced"; and I gather that Fry J. in *In re Viscount Exmouth* (2) took the same view. It was accordingly in that case declared "that the condition was altogether bad as, 1, against public policy; 2, void as being so vague."

I am of opinion on the second ground that the provision about "living" at Magherahan being indefinite as to whether living for an unascertained period, or for the whole existence of Alexander, and whether for actual or merely constructive residence, is too vague to be enforced and is void for uncertainty; and on this ground also Alexander M'Cleary is now entitled to have the residue of the estate under the will of John M'Cleary handed over to him. There will therefore be an affirmative answer to the first and second questions in the originating summons.

The difficulty has arisen from the loose wording of the will of John M'Cleary, and his estate must therefore bear the costs of all parties to these proceedings when taxed and ascertained. Mr. Moffat will get his costs as executor's costs.

Solicitors for plaintiff: *Wilson & Moyes*.

Solicitors for defendant Alexander M'Cleary: *Elliott & Clark*.

Solicitors for defendant Aaron M'Cleary: *George M'Il Dowie & Sons*.

J. M'C.

SHERRARD v. BARRON.

(1922. No. 73.)

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1922.Nov. 6.
Nov. 27.*Principal and agent—Right of an agent to make a profit out of repairs effected by him while acting for his principal.*

The defendants, who were house-agents, acted as agents for the plaintiff to collect the rents and to do the necessary repairs to her property. The defendants were originally appointed in 1908, and up to 1911 had the repairs executed by outside contractors. In 1911 the defendants opened their own repairs yard, did the repairs themselves, and charged the "usual trade prices," which included a profit. Quarterly statements of account were regularly furnished by the defendants to the plaintiff from the commencement of the agency. The plaintiff claimed to have the accounts reopened on the ground that she had been charged a secret profit by the plaintiffs on the repairs executed by them in addition to their commission.

Held, that the plaintiff knew and approved of the repair work being executed by the defendants, that the defendants had made sufficient disclosure to the plaintiff that they were charging a profit, that the charges were not shown to have been unfair or unusual, and that therefore the plaintiff was not entitled to have the accounts reopened.

Decision of Wilson J. affirmed.

APPEAL from a decision of Wilson J. in an action for the reopening of accounts stated and settled between the plaintiff, Lizzie Sherrard, and her agents, the defendants, from the time of their appointment in November, 1908, till their dismissal in September, 1919; or in the alternative that the plaintiff should have liberty to surcharge and falsify the accounts, on the grounds that the plaintiff had been charged in said accounts—1, for repairs that were never executed; 2, for alleged repairs which were not paid for; and 3, for repairs executed by the defendants themselves, and on which they charged a secret profit, in breach of their duty as plaintiff's agents.

The plaintiff in or about the year 1908 became entitled to some twenty-one houses—workmen's dwelling-houses of the kitchen class—in Belfast. The defendants had acted as agents for these properties for the plaintiff's trustees for a short time prior to their appointment by her. On the 1st November, 1908, the plaintiff entered into possession of the properties, and through her husband instructed her solicitor, Mr. William Alexander, to get the defendants to continue the agency for her. Accordingly, on the 30th October, 1908, Mr. Alexander wrote to the defendants, and instructed them to act as the plaintiff's agents in respect of these properties, and not to do any repairs which would cost upwards of five shillings without authority from the plaintiff. The defendants accepted the agency by their letter of 3rd November, 1908:—"In reply to yours of 30th October, we beg to state that we will be pleased to act as agents for Mrs. Sherrard from 1st November, 1908. The repairs we note, and agree not to do any repairs which will cost upwards of five shillings; any particular job which exceeds that amount we will place the facts before Mrs. Sherrard. Accounts to be furnished quarterly, and we are to pay all head-rents, taxes, etc."

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The defendants entered on the duties of their agency, letting the houses, collecting the rents, paying the outgoings, seeing what repairs were required, and getting these repairs executed by outside firms or contractors, sometimes getting prior authority from plaintiff for repairs costing more than five shillings, and more frequently not getting such prior authority. The defendants regularly furnished the plaintiff with quarterly accounts to 1st February, 1st May, 1st August, and 1st November, with vouchers, including the receipts for the amounts paid to the outside contractors for repairs each year, and defendants charged and were allowed five per cent. on the gross rents collected for their commission and remuneration as such agents for the plaintiff up to their dismissal on 18th September, 1919. In the year 1911 the defendants started a repairs department of their own, and did the repairs for plaintiff's houses through this department, and sent vouchers with each quarterly account for their repairs to the plaintiff from defendants' repairs department, and on the head of these vouchers defendants stated that they charged trade prices for the repairs.

These accounts were accepted and acted upon, and never challenged until the year 1919; there were some forty-two settled accounts. In the quarterly account for 1st August, 1919, a large item for £30 odd appeared, and in pursuance of instructions from the plaintiff, Mr. Alexander summarily dismissed the defendants from the agency; and on 23rd October he wrote making plaintiff's complaint that the plaintiff had instructed defendants not to do any substantial repairs without her express authority; and that in breach thereof defendants purported to have paid their branch firm large sums for repairs which were never done, and excessive sums for repairs which may have been done, and to have charged her with all these alleged repairs. He then called upon defendants to furnish an account of all sums received or paid on plaintiff's behalf from 1st August, 1913, till 19th September, 1919, and to vouch such accounts. On 25th October, 1919, the defendants replied, denying that they had charged for work which was not done, or excessive sums for any work, and stating that all work done was absolutely necessary, and the charges were fair and reasonable, adding: "With reference to your request for an account from 1st August, 1913, we think this is most unreasonable, as Mrs. Sherrard has already been furnished with quarterly accounts with vouchers during this period."

Wilson J. held that plaintiff was not entitled to have the accounts reopened, and dismissed the action with costs.

The plaintiff appealed to the Court of Appeal of Northern Ireland (1).

Serjeant Hanna K.C., J. M. Whitaker K.C., E. S. Murphy K.C., Beattie K.C., and William Lowry, for the plaintiff:—

Defendants, in charging for repairs executed by themselves, had, in addition to actual cost of material and the actual wages paid to the

(1) In the Court of Appeal, before HENRY C.J., and MOORE and ANDREWS L.JJ.

workmen in the doing of the repairs, charged a profit for themselves, that was a secret profit made out of their agency, and was a fraud on the plaintiff; and on proof of two or three instances of that kind the plaintiff was entitled as of right to have the accounts reopened.

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defendants:—

The plaintiff was to pay for whatever repairs were required in addition to the 5 per cent. The term of the original contract as to the 5 per cent. was waived. The respondents could either employ outside contractors, as they did from 1908 to 1911, or do the repairs themselves, as they did from 1911 to 1919. In either case they could pay the outside contractor, or themselves charge a reasonable profit on the actual cost of the repairs. There is nothing in our law to prevent an agent entering into a contract for reasonable remuneration, including profit for work done by the agent for his principal outside the work for which he is already remunerated as agent.

There was no proof of fraud, and no secret profit.

HENRY C.J.:—

I have had the advantage of reading the judgments about to be delivered by my colleagues, and I agree with them.

MOORE L.J.:—

This action was brought by the plaintiff, an owner of house property in Belfast, against the defendants, who are house agents, for an account of their dealings with her as her agents over the property from 1908 to 1919.

As originally framed, the action charged that the accounts were not true or proper accounts, because (a) they included charges for repairs which in fact were not paid; (b) charges for repairs in fact not executed; (c) charges in respect of which the defendants made secret profits in the execution of repairs without disclosing to the plaintiff the nature or extent of their interest.

The first two heads involve clearly a charge of fraud, but these were abandoned at the trial before Mr. Justice Wilson; and in the arguments before us charges of fraud of any sort have been specifically disclaimed by Mr. Whitaker, appellant's counsel.

Mr. Justice Wilson had evidence on which he could find that the charges made were reasonable in the sense that they were at the rate which would have been charged by an ordinary contractor, and, as I understand the appellant's case, this finding is not contested, but it is alleged that it is irrelevant to the issue in the case. Certainly if it were shown that the charges were unreasonable or unfair, it would have a most important bearing on the case, because if this were once established, the Court would make it a ground for directing an account. In *Lambert v. Still* (1), A. L. Smith L.J. says: "An account settled and a release executed cannot be set aside for the asking. What is necessary in order to set aside a settled account or a release or both

(1) [1894] 1 Ch., at p. 80.

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together when the release proceeds upon the footing of an account? It is essential to show that there has been some injustice done, some fraud, pressure, overcharge. Prove that and the release cannot stand." I use this because fraud and pressure have been abandoned by the plaintiff, and overcharge is negatived by the finding that the sums charged were the ordinary trade prices.

There is no dispute about the law, which is that an agent cannot without the knowledge of his principal make any profit for himself out of services rendered to his principal. Should he do so, he must account. It is equally settled law that it is the duty of the agent to make the fullest disclosure to his principal of all transactions in which the agent is making, directly or indirectly, a profit out of his principal. If this is done and if the principal, expressly or by course of conduct, impliedly assents, the agent can retain his profit. The plaintiff's case, if I understand it correctly, is now based on the breach of duty in this respect alleged against the defendants. The question, therefore, in the present action is one of fact: did or did not the plaintiff know that the defendants were charging profits like any ordinary contractor on the repairs to her property which she from time to time employed them to execute for her? If she did know, in the other circumstances of this case she cannot now reopen the accounts settled between them; if she did not know, the defendants cannot rely upon them.

The first account furnished by the defendants was to the trustees of the late Captain Downes (representing the plaintiff) in respect of the period from June 22nd, 1908, to 27th July, 1908, and, like all the subsequent accounts, bore upon the head of it the printed statement—"We are agents for several insurance companies, and get the usual commission. General Repairs.—Unless instructed to the contrary, we do all necessary repairs and charge the usual trade prices." I do not think that the defendants could have been more explicit as to their position in the form of accounts. The statement means we are your agents, of course, but we give you notice that if we do your business in insurance or in repairs we are to benefit in the usual way notwithstanding our relationship. As a matter of fact, the repairs from 1908 to 1911 were executed by outside contractors, and items of payment to them appear in the accounts which were regularly furnished to the plaintiff. In 1911 the defendants opened their own repairs yard, and from that time on executed the repairs themselves, and paid over moneys to themselves, and furnished the vouchers for such payment to the plaintiff, being invoices or receipts on printed bill-heads to themselves, with the added words, "Repair Department." But the matter did not stop there. The defendants wrote on September 9th, 1911, to inform the plaintiff that they were repairing some of the most urgent cases, and asking her to write to them on the question; and in reply, on 11th September, 1911, the plaintiff's husband wrote requesting them to "do what repairs you consider cannot stand over," until an intended visit of himself to the property. Plaintiff in her evidence says that in March, 1911, defendants introduced their repairs department, and did the repairs themselves. She was evidently dissatisfied, because she said, "I sent over my husband, and he saw the defendants; his visit did no good. By 1911 I came over myself. I wrote several letters to the defendants during these years complaining of the repairs."

The husband also describes his coming over in 1911 and inspecting the property with Barron. He found Barron's complaint about the state of the property exaggerated, and authorized Barron to do the repairs. The plaintiff herself said in her cross-examination that she had no objection to the defendants doing the repairs themselves. She also says she did not expect them to give her better value than strangers would.

I have gone through all the documents put in evidence, and there is no doubt of the following facts:—1st, That the defendants were authorized by plaintiff to do the repairs; 2nd, that they did do them; 3rd, that there is no overcharge, and that the prices were ordinary trade prices; and 4th, that these matters were regularly brought to the plaintiff's knowledge at each settlement of account and never objected to.

In *Isaacs & Son v. Campion & Co.* (1) the following were the facts:—Plaintiffs, fruit-brokers, who had acted as agents for the sale of defendants' fruit, rendered them accounts from time to time which showed deductions inter alia for wharfage, portorage, and warehouse rent. Defendants objected to these deductions on the ground that they were not disbursements but profit charges. It appeared that in accordance with the practice in the fruit trade, plaintiffs employed their own men at the wharf to handle the goods, and warehoused the goods in their own warehouse; that the charges made were the usual and customary charges made by fruit-brokers, and that defendants had been in the trade for many years, and were fully aware of the nature of the charges. The plaintiffs were held to be entitled to make the deductions on the ground of defendants' knowledge.

In my opinion there was no secret profit; the plaintiff and her husband were told everything that Barron was bound to tell them.

There is another element in the case which to some extent affects my judgment, that is, its triviality. Up to 1917 the evidence for the plaintiff, especially that of her husband, would go to show that they were fairly satisfied. I think this is a fair summary of the position. This means that the period attacked is from 1917 to 1919, when the agency terminated. The charge is made that the defendants charged in their ledgers against plaintiff sums generally in excess of the actual cost in their yard-book. But even assuming with the plaintiff that the defendants were not entitled to do this, there is evidence that the total amount of the overcharge during the seven years from 1912—five years of which are not now attacked—is only £12 7s. 4d. I do not know how much of this is referable to the last two years, but I would be slow to put the parties to the cost of reopening the accounts where, on the uncontradicted evidence, there can only be such a small sum in dispute. To my mind it makes the action look vexatious.

On the whole case I have arrived at the conclusion that plaintiff is not entitled to have the accounts reopened, that the judgment of Mr. Justice Wilson was right, and that the appeal should be dismissed with costs.

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ANDREWS L.J. :—

Our task in this case has been much simplified by the extreme fairness with which counsel have presented their arguments on behalf of their respective clients, and I think it may with accuracy be said that there is no real or substantial difference between them as to the law applicable to a case of this nature.

The duties of an agent towards his principal are well settled. His first duty, as Sir Thomas Plumer said in *Pearse v. Green* (1), quoting the words of the Lord Chancellor in *Lord Hardwick v. Vernon* (2), is to be constantly ready with his accounts, and to render them when demanded. This duty the agents have faithfully discharged in the present case, as it is admitted that quarterly statements have been regularly furnished by the defendants to the plaintiff from the commencement of the agency in 1908.

Next, it is the duty of the agent to make full and fair disclosure to his principal of all material facts affecting his relations with, and the discharge of his duties to, his principal, which would be likely to affect or operate upon his principal's judgment: *Dunne v. English* (3) and *King v. Anderson* (4). He must never be allowed to bring a personal interest of his own into conflict with his duty to his principal unless he has given the fullest information to his principal of the exact nature of his interest, and the latter has assented. Such duty of disclosure is not satisfied by merely stating that he has an interest—*Imperial Mercantile and Credit Association v. Coleman* (5)—or by making statements which might be constructive notice sufficient to put the principal on inquiry: *Dunne v. English* (3). The information should be such as to render it unnecessary for the principal to make any inquiry: *Faucett v. Whitehouse* (6). The obligation of proving that he gave such information lies on the agent. The underlying principle upon which all these cases are based is that it is of paramount importance in all transactions between agent and principal, or other parties who stand in a fiduciary relationship to one another, that there should be nothing in the nature of underhand dealing. It follows, however, that when once the possibility of such underhand dealing has been prevented by full disclosure of the character referred to, and, as Lord St. Leonards said in *Murphy v. O'Shea* (7), by the agent dealing with his principal at arm's length, there is no principle of law which prevents the agent entering into an arrangement for his own benefit, or into a contract from which he will derive personal gain or profit.

The statement of claim contained charges of the gravest character. In it the plaintiff alleged that the accounts which had been furnished by the defendants included (a) charges for repairs which were not paid, (b) charges for repairs which were not executed, (c) charges in the nature of secret profits, and (d) charges for repairs executed in disobedience to the plaintiff's instructions. The temperate language employed by the draftsman of the statement of claim and of the counsel who argued the case before us cannot alter the character of

(1) Jacob & Walker, 135.

(2) 4 Ves. 504.

(3) L. R. 18 Eq. 524.

(4) I. R. 8 Eq. 147.

(5) L. R. 6 H. L. 189.

(6) 1 Russ. & Mylne, 132.

(7) 2 Jones & La Touche's Rep. 422.

at least the first three charges referred to, namely, fraud, and fraud of a very gross and dishonourable kind.

In my opinion, the first two charges may be summarily dismissed; for I agree with Mr. Justice Wilson that no proper evidence was adduced in their support. Indeed, the plaintiff admits that they cannot be sustained. The last charge is based on the agreement which I shall assume was arrived at in Mr. Alexander's letter of 30th October, 1908, and the defendants' reply of 3rd November, 1908, to the effect that the defendants should neither execute themselves nor employ others to execute repairs costing more than five shillings for any particular job without previously obtaining the plaintiff's sanction and approval. I hope I am doing Mr. Whitaker, who opened the case for the plaintiff, no injustice when I say that he laid no weight on this part of the case. It is clear that from the outset this five-shilling rule was departed from, as it appears to me, by mutual assent. Put at its lowest, it must be taken to have been admitted that it was waived; for plaintiff's husband, who assisted her in looking after the property, admitted on cross-examination that from the first the defendants departed from the original bargain; that he did not wish to hold them tight to the five shillings, but that that did not necessarily mean that he waived the terms of the contract about the five shillings; that so long as he could see for himself that the vouchers were correct, he did not hold the defendants tight to the five shillings. This is, in my opinion, a clear admission of waiver in everything except express terms; and grave injustice would be caused to the defendants were we, after the lapse of twelve years, to reverse a practice settled and acquiesced in by both parties.

This leaves only one charge remaining, namely, that the defendants made a secret profit out of the repairs which they executed. It is admitted that they made a profit, and the only question which we have to determine is whether within the principle of the authorities cited above the defendants failed to make that full and fair disclosure to the plaintiff of the fact that they were charging a profit, and of its character, which it was incumbent on them to do by reason of the fiduciary relationship in which they stood to the plaintiff.

Having given the matter my most careful consideration, I have come to a conclusion favourable to the defendants. At the top of each quarterly statement or account furnished by the defendants to the plaintiff were the words:—"General Repairs: Unless instructed to the contrary we do all necessary repairs, and charge the usual trade prices." Here was the clearest intimation from the commencement of the agency that in the absence of instructions to the contrary the defendants would execute all necessary repairs, and that they would charge the usual prices in the trade, i.e., the prices which they would charge to other clients, or which other firms would charge to the defendants. It is sought to detract from the importance of this statement by saying that from the commencement of the agency in 1908 until the year 1911 the defendants had no repair yard, and the repair work was accordingly done by other firms; and that when this practice was changed in 1911 no intimation was given by the defendants to the plaintiff of the change which had taken place. I cannot agree. With the very first account furnished after the defendants commenced to do

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the work was sent a detailed statement of the work done by and of the moneys payable to H. E. Barron & Co.'s repair yard. Similar statements were sent with the subsequent quarterly accounts.

These documents are referred to as remarkable in that they purport to represent payments made by H. E. Barron & Co. to H. E. Barron & Co.; but such documents are not at all unusual in a business comprising two or more branches, and in the present case the detailed accounts contained simply particulars of the work done by H. E. Barron & Co. in the capacity of house repairers for H. E. Barron & Co. as house agents for the plaintiff. But whatever criticism be made of these detailed accounts they must, in my opinion, be admitted to have shown to the plaintiff and her husband that the repairs were from that time forward being executed by the defendants, and both the plaintiff and her husband obviously appreciated this fact. In her direct examination the plaintiff admits that in March, 1911, defendants introduced their repairs department and did the repairs themselves; that she sent over her husband and he saw the defendants, but his visit did no good. Her husband, however, explains in cross-examination what the plaintiff evidently meant by saying that his visit did no good. He says: "With regard to the account of 1st February, 1912"—the first which contained charges for repair work executed by the defendants—"I told defendants the charges were excessive." This means, as I read it, that the objection of the plaintiff and her husband was not to the fact that the defendants were themselves doing the work—that they knew and were quite content with—but they considered at the time that the defendants' charges were excessive.

Assuming, therefore, as I think is clearly established by the evidence, that the plaintiff knew and approved of the repair work being executed by the defendants, the only question which remains is whether the defendants made sufficient disclosure to the plaintiff of the fact that they were charging a profit. In the first place, the plaintiff knew that the defendants were a business firm and not mere public philanthropists, and they were reminded four times in each year that repairs were being charged for at the "usual trade prices," which the plaintiff and her husband must be assumed to have known included a profit. In cross-examination, having admitted that she had no objection to the defendants doing the repairs themselves, the plaintiff added that she could not say that she expected them to give her much better value than if they employed strangers. "I did not," she says, "expect them to do it at a loss." I hold, therefore, that it is clearly demonstrated that the plaintiff knew not only that she was being charged a profit, but that that profit was the usual trade profit. Now, if there was any proper evidence to satisfy me that the profit charged was exorbitant or excessive, I would hold with the plaintiff on the ground that she had no notice of it, and that she never contracted to pay anything in excess of what was usual in the trade; but there is no such evidence. The plaintiff's husband, speaking even of the account of 1st February, 1912, to which such serious objection was taken at the time, says now, "we don't want to open that account"; and later in his evidence he observes, "up to 1917 I was fairly satisfied." There is not one word of evidence to show that after 1917 any larger profit was charged than before. Referring to all the charges,

Mr. Humphrey Barron says that they were fair and reasonable, and at least as low as could have been charged by any outside firm, and expert evidence was given to the like effect by other witnesses on behalf of the defendants.

Severe criticism was levelled by Mr. Whitaker against the defendants for their methods of book-keeping, for the absence of time-sheets, and for the discrepancies which appeared as regards charges between the wages book, yard ledger, and accounts furnished. He condemns a system of book-keeping which has for its basis a yard book, which is now admitted to have been merely an estimate of probable expenditure. Much but not all of his criticism was, in my opinion, justly made. But even if everything that he says in reference to these accounts were correct, he has failed to establish what in the circumstances it was, in my opinion, necessary for him to prove, namely, that the profit charged against the plaintiff brought the cost of the repairs in any single job to more than the "usual trade price" which the defendants intimated in the words which I have quoted they intended to charge for their work. An expenditure in repairs upon this old property of less than 20 per cent. of the rental is *prima facie* both reasonable and proper.

The conclusion at which I have arrived in this case is based upon principles of contract quite apart from the equitable doctrines of acquiescence and laches. But had it been necessary to do so, I am of opinion that much reliance might have been placed upon these doctrines to answer the belated claims of the plaintiff, who and whose husband were, in my opinion, fully alive from the outset to their rights, and whose delay in instituting proceedings obviously caused serious prejudice to the defendants.

Solicitor for plaintiff: *William Alexander.*

Solicitors for defendants: *David M'Gonigal & Sons.*

J. M'C.

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(N. I.)
1922.

SHERBARD

v.

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Appeal.
(*N. I.*)
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Nov. 13.
Dec. 5.

IN THE MATTER OF THE ESTATE OF JAMES M'ALEA. BETWEEN MARY MALLON, PLAINTIFF, AND TERESA M'ALEA, EDWARD GILMARTIN, AND HUGH MURRAY, DEFENDANTS. REVIVED AND CONTINUED IN THE NAMES OF ELIZABETH MURRAY, ROSE ANN M'ERLEAN, AND MARTHA TERESA MULHOLLAND, PLAINTIFFS, AND TERESA M'ALEA, EDWARD GILMARTIN, AND HUGH MURRAY, DEFENDANTS (1).

(1921. No. 7.)

Statutes of Limitation.—Possession as administratrix—Widow and infant children remaining in possession—Action by child who had come of age and obtained a grant of administration de bonis non.

J. M'A., who was possessed of a licensed public-house and a farm of land, died intestate on 18th January, 1892. He left him surviving his widow and several daughters. The widow obtained a grant of letters of administration to his estate on 23rd March, 1892, and continued to trade and to work the farm until her death on 13th April, 1921. Four of the children remained on in possession with their mother. Two months after the death of the widow a daughter Mary, who had married and left the farm in her father's lifetime, took out a *de bonis non* grant to her father's estate, and instituted the present action for administration of his estate. Mary died before the action could be tried. By her will Mary left all her property to her two daughters, and appointed them her executrices. Both these daughters were made plaintiffs by revivor. E., another daughter of J. M'A., the deceased, extracted a further grant of administration *de bonis non* to the estate of her father, and she was also made plaintiff by revivor. The defendants were the executors of the widow and T., a daughter of J. M'A., who was a minor when J. M'A. died, but had attained age and had continuously remained in occupation of the farm, and to whom her mother had bequeathed all her property, subject to a legacy of £60 to another daughter R.

Held, that the possession of the widow should be attributed to her character as administratrix, and that although she had entered into possession on behalf of herself and all the next-of-kin, she was entitled to the benefit of the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), sect. 13, and that the action had rightly been dismissed by Wilson J.

ACTION to have the real and personal estate of James M'Allea administered, and for the usual accounts and inquiries.

James M'Allea died intestate on 18th January, 1892. At the time of his death he was possessed of certain leasehold premises situate at Ballynahinch, Co. Down, together with the spirit licence attached, and also certain lands and personal property. On 23rd March, 1892, Martha M'Allea, his widow, obtained letters of administration to her deceased husband, and continued to trade in the licensed premises and to work the farm until her death on 13th April, 1921. In addition to the widow, four children, Teresa M'Allea, Martha M'Allea, Rose Ann M'Erlean, and Margaret M'Allea, remained on in possession. Mary Mallon (otherwise M'Allea), one of the deceased's daughters, had married and left the farm previous to her father's death. Elizabeth Murray, another daughter, had also married and left the premises. Margaret, who was of age on her father's death, continued to live in the premises until her death in 1915. Martha and Rose Ann, who

(1) Before SIR DENIS HENRY, Bart., C.J., and MOORE and ANDREWS L.JJ.

were minors at the time of their father's death, continued to live in the premises for some time; but both had married and left more than twenty years before action brought. The remaining child, the defendant Teresa, continued to remain on the farm. On the 31st October, 1917, the widow had mortgaged the premises to a bank, and the children who were of age had joined in this deed. On 13th November, 1918, the widow, Martha M'Alea, made a will by which she appointed the defendants Gilmartin and Murray executors, and left all her property to her daughter, the defendant Teresa, subject to a legacy of £60 to her daughter Rose Ann Kerr. On 25th June, 1921, Mary Mallon, the original plaintiff, took out a *de bonis non* grant to her father's estate, and instituted proceedings for administration. Before the action had been brought to trial, Mary Mallon, the original plaintiff, died, leaving a will under which she bequeathed all her property to her two daughters, the plaintiffs, by revivor, Rose Ann M'Erlean and Martha Teresa Mulholland, and appointed them her executrices. For the purpose of continuing the action, Elizabeth Murray, on 20th February, 1922, took out a further *de bonis non* grant to the estate of her father, James M'Alea, and she was also made plaintiff by revivor. The defendant Teresa M'Alea pleaded that the plaintiffs' claim was barred by the Statutes of Limitation and by laches, delay, and acquiescence on the part of the plaintiffs.

Wilson J. dismissed the action.

R. D. Megaw K.C. and W. Lowry, for the plaintiffs Rose Ann M'Erlean and Martha Mulholland.

John M'Gonigal K.C. and W. O. Hume, for the defendant Teresa M'Alea.

James Williamson K.C. and S. C. Porter, for the defendants Edward Gilmartin and Hugh Murray, executors of the will of the widow, Martha M'Alea.

ANDREWS L.J. delivered the judgment of the Court as follows:—

Mary Mallon, the original plaintiff in this suit, was one of the children and next-of-kin of James M'Alea, who died intestate on 18th January, 1892. She was married and had left her father's home before his death. One of her sisters, Elizabeth Murray, a plaintiff by revivor, had likewise married and left. The widow, Martha, and four other children remained on in possession. One of them, Margaret, who was of age on her father's death, remained in the family home until her death in 1915. Martha and Rose Ann, who were minors, remained with their mother for some time, but both had married and left more than twenty years before this action was instituted; whilst the remaining child, the defendant Teresa, who was also a minor when her father died, has continuously remained on the property.

Two months after her husband's death the widow obtained a grant of letters of administration to his estate. She continued to trade in the licensed premises and to work the farm until her death on 13th April, 1921. On 13th November, 1918, she made a will

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under which she appointed the defendants Gilmartin and Murray executors, and left all her property to her daughter, the defendant Teresa, subject to a legacy of £60 to the latter's sister, Rose Ann Kerr. Two months after the widow's death, the original plaintiff took out a *de bonis non* grant to her father's estate, and instituted these proceedings for the administration of his estate. Both writ and statement of claim show that it was as administratrix, and as such only, that she prosecuted her claim. Before the action could be brought to trial she also died, leaving a will under which she bequeathed all her property to her two daughters, the plaintiffs by revivor, Rose Ann M'Erlean and Martha Teresa Mulholland, and appointed them her executrices; and for the purpose of continuing the suit Elizabeth Murray on 20th February, 1922, extracted a further *de bonis non* grant to the estate of her father, James M'Alea.

As the action was instituted, as above stated, by Mary Mallon solely in her representative capacity as administratrix, we do not understand why, on reviving the suit, it was deemed necessary to join Rose Ann M'Erlean and Martha Teresa Mulholland, the executrices of Mary Mallon, as co-plaintiffs with the new administratrix, Elizabeth Murray; but, as the revivor order has not been challenged, we shall assume that they are proper plaintiffs, and that they represent such beneficial interest, if any, as Mary Mallon had in her father's estate at the date of her death. The matter is, however, further complicated by the fact that, although a joint notice of appeal was served on behalf of all three plaintiffs, we are informed by Mr. Megaw, who opened the appeal, that he only appeared on behalf of Rose Ann M'Erlean and Martha Mulholland, and that Elizabeth Murray did not wish to proceed with the appeal.

The first question to be determined is the capacity in which the widow Martha entered into possession of her husband's estate. On behalf of the plaintiffs it is alleged that she did so as bailiff, four of her children being at the time minors; that nothing subsequently occurred to change the character of her possession; and that the Statute of Limitations accordingly never ran in her favour. On behalf of the defendants it is contended that she entered as administratrix, and that, by reason of the fact that no claims had been made against her or acknowledgment made by her to her children, she had acquired a good statutory title to the property prior to her death, and was competent to dispose of it as she did by her will.

In *Graham v. Chambers* (1) the widow was held to have entered as a bailiff, and therefore, according to Palles C.B., as an express trustee for her infant children. Having regard to her fiduciary position, he consequently held that she could not acquire a title under the Statute of Limitations. But in that case the widow had not taken out representation until two months before action brought and twenty-five years after her husband's death; and the Chief Baron, in giving judgment, states that he limits his decision to the case of a widow entering at a time when the children are under age and "she has no other ostensible reason for entering."

Precisely the same limitation is to found in the judgment of Kekewich J. in *Wall v. Slonwick* (2). Dealing with the facts of that

(1) 36 I. L. T. R. 108.

(2) 34 Ch. D. 763, at p. 766.

case, he says : " It will, I think, be safer and more correct to treat the widow as having occupied and received rents and profits as the bailiff of her infant children. Not only is this character known to the law, but it is presumed to exist whenever circumstances require it, that is, whenever it is proper to make a man accountable for the rents and profits of an infant's estate, and he cannot be shown to have been in possession in some other character."

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In the present case the widow Martha was practically from the date of her husband's death his administratrix. As such she had an " ostensible reason for entering." It was a character other than that of bailiff, to which her possession could, and therefore in our opinion should, be attributed. We accordingly hold that she entered and remained in possession as administratrix. As such she was an implied, not an express, trustee for all those who were entitled on the intestacy, and not merely for those in possession (per Molony C.J., in *Birmingham v. Birmingham* (1)).

In these circumstances, we think that the rights of the parties are fairly clear. Although the widow Martha entered into possession of the lands on behalf of herself and all the next-of-kin, she was entitled to the benefit of the provisions of sect. 13 of the Law of Property Amendment Act, 1860, by which it is enacted that no suit or other proceeding shall be brought to recover the personal estate or any share of the personal estate of any person dying intestate possessed by the legal personal representative of such intestate but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of such estate or share or some interest in respect thereof shall have been accounted for or paid, or an acknowledgment given as therein mentioned.

We have no very definite information as to the relationship which existed between the widow Martha and those of her children who remained on in possession with her; but it must, in our opinion, be assumed that no adverse title was being acquired by the administratrix whilst they continued in possession. For this reason we are of opinion that she never became entitled to the distributive shares of Margaret, who was still in possession when she died in 1915, or of the defendant Teresa, who has always been and still is in possession. On the other hand, both Martha and Rose Ann had married, and been out of possession for more than twenty years before action brought without part-payment or acknowledgment, and the administratrix had accordingly acquired good statutory title against them. Likewise the original plaintiff, Mary Mallon, and the present plaintiff, Elizabeth Murray, both of whom had been married and had gone out of possession before their father's death, and to whom no part-payment or acknowledgment has apparently ever been made, have both lost by adverse possession to the administratrix the distributive shares in his estate to which, on their father's death, they became entitled under the Statute of Distributions.

The result is, in our opinion, that when the original plaintiff, Mary Mallon, took out administration to her father's estate, there was

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nothing upon which the grant could operate, and a like observation, of course, applies to the subsequent grant to the present plaintiff, Elizabeth. One-ninth share had become absolutely the property of Margaret, one-ninth had become the property of Teresa in her own right, and the remaining seven-ninths, representing her original distributive share and the shares acquired by adverse possession, passed under the will of the widow and administratrix to her daughter, the defendant Teresa. The simple answer, therefore, to this action for administration of James M'Alea's estate is that prior to the institution of the proceedings, his estate as such had ceased to exist, for the property had "come home" to the parties entitled in the shares above indicated. It may be urged that the plaintiffs are entitled to distributive shares in the one-ninth share of Margaret. Admitting this to be so, it does not entitle them to the relief sought in this action or any part thereof. Such a claim could only arise in a properly constituted suit for administration of the estate of Margaret, representation, of course, being first raised to her estate.

We desire further to qualify what we have stated as regards Margaret's estate being entitled to a one-ninth share by saying that our opinion is based solely on the evidence given in this case. It is possible that if the suit had been conversant with Margaret's share alone, additional evidence might have been given as to either a satisfaction or a release, which would have materially affected her rights.

We have only to add that in arriving at the conclusion which we have done, we have not forgotten the mortgage of 31st October, 1917. It is apparent that deceased's children joined in this deed at the request of the bank and for the purpose of giving it greater security. The deed is properly not relied upon as amounting to either an acknowledgment or an estoppel; and, short of one or the other, it cannot, in our opinion, affect the rights of the parties.

The appeal must be dismissed with costs.

Solicitor for the plaintiffs: *P. J. Magee.*

Solicitors for the defendant Teresa M'Alea: *Johnston & M'Court.*

Solicitors for the defendants Edward Gilmartin and Hugh Murray:
Wallace & Co.

J. M'C.

IN THE MATTER OF THE ESTATE OF JAMES RICHARD DREW,
DECEASED. BETWEEN THOMAS MARRY, PLAINTIFF, AND
CHARLES DREW, JAMES MARRY, MARY CATHERINE
MARRY, IMELDA MARRY, CATHERINE MARRY, AND
CHRISTINA COLBERT, DEFENDANTS.

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1922.

Dec. 8.

1923.

Jan. 23.

(1922. No. 571.)

Revenue—Estate duty—Will—Registered land—Local Registration of Title (Ireland) Act (54 & 55 Vict. c. 66), s. 47—Whether payable out of freehold lands or residuary personal estate—Finance Act, 1894 (57 & 58 Vict. c. 90), sect. 9, sub-s. 1; sect. 8, sub-s. 2—“Property passing to the executor as such”—Bequest of farm and all stock thereon—Meaning of “stock.”

On an application to determine (1) whether estate duty was payable in respect of freehold registered land by the devisees and owners of the testator's freehold lands, or by the residuary legatees, and (2) as to meaning of the word “stock” in a bequest of farm and all stock thereon:

Held, that the freehold registered lands specifically devised were primarily liable to a rateable part of the estate duty in exoneration of the residuary estate.

Held also, that under the devise of a farm “and all stock thereon” 286 barrels of oats stored on the farm passed to the devisee of the farm.

ORIGINATING SUMMONS taken out by the executor of the will of James Richard Drew, deceased, to determine whether the devise of the testator's farm of Monknewtown, Co. Meath, with all stock thereon at his death unto the defendant, Charles Drew, operated as a gift to the said Charles Drew of 286 barrels of oats on the said lands; and whether the estate duty payable on the death of James Richard Drew in respect of his freehold lands registered under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), should be borne by such freehold lands or by the residuary personal estate of the said James Richard Drew.

James Richard Drew, of Monknewtown, Slane, in the Co. Meath, made his will, dated the 18th August, 1922. He was the owner of—1, a farm at Monknewtown containing 140 acres and 16 perches; 2, a farm at Dowth containing 12 acres and 34 perches; and 3, a farm at Monknewtown containing 9 acres 3 roods and 3 perches. These three farms had been purchased under the Irish Land Purchase Acts, and registered under the Local Registration of Title (Ireland) Act, 1891. The annuities subject to which the farms were purchased had been redeemed by the testator.

The testator was also the owner of two other farms—one at Proudstown, and another at Balfaddock. These two last-named farms were not registered under the Local Registration of Title Act, 1891.

By his will the testator devised the farms at Dowth and Balfaddock, with all the stock thereon at his death, to his nephew Thomas Marry, the plaintiff and executor of the will; and he further devised the farm at Monknewtown containing 140 acres 16 perches, with all stock thereon at his death, to his nephew Charles Drew, one of the

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defendants; and he devised the small farm at Monknewtown containing 9 acres 3 roods and 3 perches to his nephew James Marry, also a defendant. The testator devised and bequeathed the residue of his estate in equal shares to his sister, Mary Catherine Marry (one of the defendants), and his nieces, Imelda Marry, Catherine Marry (both of them being defendants), Nellie Drew, Frances Drew, and Lauretta Drew (who were not defendants), and Christina Colbert (a defendant).

Upon the larger farm of Monknewtown there were at the testator's death 286 barrels of oats. The plaintiff in an affidavit stated that the testator, when he grew oats on the farm, was not in the habit of using all such oats for feeding cattle, or for other purposes on the lands. He estimated that the testator usually grew about twice as much oats as he could use on the lands. He also stated that the oats were all old oats, and included none of the crop of 1922, which had since been reaped and thrashed.

Newett, for the plaintiff, the executor of the will.

Morgan Byrne, for the residuary legatees.

Geoghegan, for the defendants Charles Drew and James Marry.

His Honor, having stated the foregoing facts, continued:—

The question which I have to decide is whether the bequest of the stock on the farm covered the oats mentioned.

In my opinion the word "stock" is quite wide enough to cover a stock of oats, whether it is large or small, irrespective of the season in which it was reaped. A "stock of oats" and a "stock of hay" are familiar expressions. The stock may be last year's, but it is still stock. It may be for consumption on the lands or for sale, but it is still stock. I must therefore hold that the will gave the entire stock of oats on the farm to the devisee thereof.

There is a further and a much more difficult question to decide, which is concerned with all the registered lands.

It is contended that the lands specifically devised are entitled to be indemnified by the residuary personal estate against all estate duty by virtue of sect. 9, sub-s. 1, of the Finance Act, 1894. This section says: "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable." Now, it is argued that under the Local Registration of Title (Ireland) Act, 1891, freehold registered land does pass to the executor "as such" within the meaning of the Finance Act, and that consequently it is entitled to be indemnified against estate duty by the residuary estate.

Let us see fully how the matter stands. Sect. 8, sub-s. 2, enacts that sect. 47 of the Local Registration of Title (Ireland) Act shall apply as if estate duty were therein mentioned as well as succession duty. This sect. 47 enumerates as burdens on registered land, succession duty and a number of other liabilities which are specific charges on the lands; and sect. 8 of the Finance Act adds estate duty to the category. Under the ordinary rules of administration land

bears its own specific burdens, and the heir-at-law or devisee is not entitled to any indemnity from the residuary estate. But it is said that these rules have now no application to registered land because it is to all intents and purposes personal estate. No doubt by sect. 86, sub-s. 3, registered land is to be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents as if it were personal estate. But this is made subject to the following proviso:—"Provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies." This preserves the respective obligations of lands and money inter se, notwithstanding that registered land is to be administered as personal estate. But it may be said that it only preserved them as they existed at the date of the passing of the Local Registration of Title Act—the words "now applicable" having been used—and that the order of administration was subsequently altered by sect. 9, sub-s. 1, of the Finance Act, which throws a rateable part of the whole estate duty only on such property as does not pass to the executor as such. I will subsequently deal with the meaning of the words "executor as such," but I wish to point out that the words "now applicable" in the proviso I have quoted cover estate duty. The reason I say so is that sect. 47 of the Local Registration of Title Act is to be read as if estate duty were included therein as well as succession duty; and as estate duty is treated as a specific charge, it comes within the terms of the proviso.

I come now to the words "executor as such." In a sense everything that vests in an executor vests in him "as such." Therefore the words must have some special meaning. I think they can only refer to a passing to the executor *virtute officii*, without the aid of any special enactment such as the Local Registration of Title (Ireland) Act.

If "passing to the executor as such" only means a passing under the general law, there is no interference with the proviso in sect. 86 of the Local Registration of Title (Ireland) Act; but if it means a passing such as is effected by that Act, it does interfere with the proviso. If this latter were intended, one should expect to find in the Finance Act some such expression as "notwithstanding the proviso contained in sub-sec. 3 of sect. 8 of the Local Registration of Title (Ireland) Act." I therefore hold that each of the farms specifically bequeathed is primarily liable to a rateable part of the estate duty in exoneration of the residuary estate.

I appointed the defendants Mary Catherine Marry, Imelda Marry, and Catherine Marry to represent the absent residuary legatees, whose interests are identical. The costs must come out of the residue.

Solicitors for the plaintiff: *Gerrard & Son.*

Solicitor for the residuary legatees: *C. P. Tracy.*

Solicitors for the defendants Charles Drew and James Marry:
William Smyth & Son.

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Samuels J. JOHN HUGHES AND OTHERS, PLAINTIFFS, v. DUNDALK HARBOUR COMMISSIONERS, DEFENDANTS (1).

1922.

July 24, 28. *Public body—Statutory duty—Failure to perform—Summary procedure—Right of action—Pilotage—Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31); Pilotage Order Confirmation (No. 2) Act, 1920 (10 & 11 Geo. 5, c. civ)—Compulsory pilotage—Contravention by shipowner—Duty of pilotage authority to licensed pilots.*

By the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), the employment of pilots licensed by the port authority, and payment to that authority of the appropriate pilotage dues, were made obligatory in the case of all vessels entering, leaving, or making use of the port and harbour of D., other than vessels excepted under that Act, and vessels navigated by masters or mates licensed as pilots by the port authority, the master of any vessel bound by the compulsory pilotage enactments who refused to take the services of a licensed pilot when tendered being liable to a penalty on summary conviction.

The defendants, the pilotage authority, received the pilot fees which were pooled and paid partly to the plaintiffs who were licensed pilots, and partly to a fund created for the plaintiffs' benefit called the pilot's benefit fund. A shipowner, L., who used the port, and whose vessels came within the compulsory pilotage regulations, refused to take the services of the plaintiffs when tendered, and refused to pay to the defendants the pilotage fees which would have been payable if the plaintiffs' services had been accepted. The defendants did not prosecute the masters of these vessels, nor take any steps to recover the pilotage fees. In an action by the plaintiffs for a declaration that the defendants had failed in their statutory duty and for damages:

Held, that the procedure for penalty for breach of the pilotage enactments was not exclusive, that there was a statutory duty cast upon the defendants to enforce compulsory pilotage, and that they had failed to perform that duty in the case of the above-mentioned shipowner to the prejudice and damage of the plaintiffs. For the breach of this duty the defendants were held liable to the plaintiffs in damages to the amount of pilotage fees which could have been earned by the plaintiffs had licensed pilots been carried by L.'s vessels for the six months prior to action brought.

ACTION.

The following were the material facts as put in evidence:—The plaintiffs were five pilots licensed by the defendants, the pilotage authority for the port and harbour of Dundalk, under the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), and the Pilotage Order Confirmation (No. 2) Act, 1920 (10 & 11 Geo. 5, c. civ). Under the above statutes and the bye-laws made thereunder the plaintiffs were bound to offer their services (when directed by the defendants' officer) to all vessels bound to take pilots which left the port and harbour of Dundalk. The pilotage fees paid for the services of the pilots were divided among the defendants and pooled, being ultimately paid in accordance with the statutory enactments between the plaintiffs in equal shares, and a fund created for their benefit called the Pilots' Benefit Fund. A firm, Messrs. Lockington & Co., constantly used the port and harbour with their vessels, which carried neither masters nor mates who were certified as pilots, nor were vessels exempted from pilotage under the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31).

(1) Before SAMUELS J. (sitting for POWELL J.).

On the instructions of the proper officer the plaintiffs in turn, according to arranged rota, offered their services as pilots of these vessels when the vessels were leaving the port, but their services were always refused. Each tender of service and refusal was recorded by the pilot concerned, and reported in writing to the defendants' proper officer. From time to time the defendants presented to Messrs. Lockington accounts for harbour dues, including the pilotage fees which would have been earned by the plaintiffs had their services been accepted. Messrs. Lockington refused to pay these fees, and the defendants took no proceedings to recover them or to prosecute the masters of Messrs. Lockington's vessels under sect. 11, sub-s. 2, of the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31).

Samuels J.
(for Powell J.)
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The plaintiffs claimed a declaration that pilotage was compulsory on all vessels save such as were excepted by the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), within the Dundalk pilotage district, and that the defendants had failed, neglected, and refused to enforce the statutes and statutory orders relating to compulsory pilotage in the district in the case of certain ship-owners and masters of vessels plying in the district to the prejudice of the plaintiffs. The plaintiffs further claimed an account and damages.

The defendants denied neglect of any statutory duty, and submitted as a matter of law that the plaintiffs could not recover, as the defendants had not received any pilotage fees in respect of the vessels that the plaintiffs alleged used the port without pilots. The defendants contended that the plaintiffs' interest was only in pilotage dues actually received by them, and that the plaintiffs' remedy was to proceed by summary jurisdiction as common informers to enforce the fines to which under the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), a master of a vessel was liable if he acted in contravention of the Act. The defendants also contended that the action must fail, as it was one to enforce a public duty which could only be brought by the Attorney-General, and pleaded the Public Authorities Protection Act. The arguments for plaintiffs and defendants appear sufficiently in the judgment.

Healy K.C., Lardner K.C., and Cecil Lavery, for the plaintiff.

Serjeant Hanna K.C., Denning K.C., and Vincent Rice, for the defendants.

John Bartley held a watching brief for Messrs. Lockington.

The following are the material provisions of the principal Act, the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31) :—

“ PART II.

“ *Pilotage Orders.*

“ 7. (1) The Board of Trade may, by Order made under this Act (in this Act referred to as a Pilotage Order), (a) make such

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rearrangement of pilotage districts and pilotage authorities as the Board think necessary or expedient . . . (e) empower a pilotage authority to delegate to a committee thereof any of its powers and duties, and provide, if it seems necessary or desirable, that the decisions of the committee on questions so delegated shall not require confirmation by the pilotage authority . . . (h) provide that pilotage shall be compulsory in any area where it has previously not been compulsory, or provide, in connexion with any rearrangement of a pilotage district, that pilotage shall be non-compulsory in any area where it has been compulsory, subject to provision being also made for the payment of compensation to the pilots concerned for any loss or damage which may be incurred by them in consequence of such rearrangement :

“(2) Provision shall be made by Pilotage Order for the direct representation of pilots either on the pilotage authority or on the committee of the pilotage authority of any district where there are not less than six licensed pilots if a majority of the pilots licensed for the district signify to the Board of Trade that they desire such representation, and, where such provision is made, provision shall also be made for the representation of shipowners on the authority or committee, as the case may be.

“8. (1) For the purposes of this Act the districts established as pilotage districts under Pilotage Orders made under this Act shall be pilotage districts, and the pilotage authorities shall be the pilotage authorities as constituted by Pilotage Orders made under this Act.

“(2) Until otherwise provided by Pilotage Order made under this Act, every pilotage district which is, at the time of the passing of this Act, a pilotage district shall continue to be a pilotage district, and every pilotage authority which is a pilotage authority at the time of the passing of this Act shall continue to be a pilotage authority.

“10. (1) Subject to the provisions of any Pilotage Order, pilotage shall continue to be compulsory in every pilotage district in which it was compulsory at the time of the passing of this Act, and shall continue not to be compulsory in every pilotage district in which it was not compulsory at the time of the passing of this Act; and subject to the provisions of this Act all exemptions from compulsory pilotage in force at the date of the passing of this Act shall cease to have effect.

“(2) Any reference in this Act to a pilotage district in which pilotage is compulsory shall, in the case of a district in which pilotage is compulsory only in part of the district, be construed, if the context so requires, as a reference to that part of the district only.

“11. (1) Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship), while navigating for any such purpose as

aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district), shall be either (a) under the pilotage of a licensed pilot of the district, or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship.

“(2) If any ship (other than an excepted ship), in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship.

“(3) For the purposes of this Act the following ships are excepted ships—(a) ships belonging to His Majesty; (b) pleasure yachts; (c) fishing vessels; (d) ferry-boats plying as such exclusively within the limits of a harbour authority; (e) ships of less than 50 tons gross tonnage; (f) ships exempted from compulsory pilotage by bye-law as hereinafter provided by this section.

“15. (1) Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.

“16. Subject to the provisions of this Act, a pilotage authority may license pilots for their district, and do all such things as may be necessary or expedient for carrying into effect their powers and duties.”

Section 17 sets out the various matters which may be comprised in bye-laws, i.e., qualification of pilots, number of pilots, government of pilots and apprentices, system of supply and employment of pilots, punishments for breach of bye-laws, rates of payment of pilots, pooling of pilotage dues, deductions from pilot funds, bonds, establishment of pilot benefit funds, examination of masters and mates for certificates, prohibition of grant of such certificates, conditions of renewal of such certificates, issue of deep-sea certificates, application of bye-laws for good government and punishment of pilots to cases of certified masters and mates, contributions to pilot fund by owners of ships having certified masters and mates. The material provisions are as follows:—

“17. (1) A pilotage authority may, by bye-laws made under this Act, (f) fix for the district the rates of payments to be made in respect of the services of a licensed pilot (in this Act referred to as pilotage dues), and define the circumstances and conditions under which pilotage dues may be payable on different scales, and provide for the collection and distribution of pilotage dues; and (g) if and so far as it appears to the authority to be generally desired by the pilots concerned, provide for the pooling of pilotage dues earned by the licensed pilots or by any class of pilots in the district; and (h) provide for a deduction being made

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from any sums received by pilots of any sums required for meeting the administrative expenses of the authority or any contributions required for any fund established for the payment of pensions or other benefits to pilots, their widows, or children (in this Act referred to as a pilots' benefit fund); and (p) require the owners of ships whose masters or mates hold pilotage certificates to contribute towards the pilot fund or account of the pilotage district, and require the holders of such certificates to make a periodical return to them of the pilotage services rendered by them, provided that the contribution so required from an owner shall not exceed such proportion of the pilotage dues which would have been payable in respect of the ship if the master or mate had not held a pilotage certificate, as may be fixed by the Board of Trade.

" 19. The grant or renewal of a license to a pilot by a pilotage authority under the powers given to them by this Act does not impose any liability on the authority for any loss occasioned by any act or default of the pilot.

" 21. (1) All receipts of a pilotage authority in their capacity as such (other than any money received by them on behalf of and paid over to any pilot, or if the authority administer a pilots' benefit fund, any sums received by them as direct payments for that fund) shall be paid into a separate fund or account, to be called the pilot fund or account of the pilotage district.

" (2) All expenses incurred by a pilotage authority in the exercise of their powers or performance of their duties as such authority shall be paid out of the pilot fund or account, and, except so far as may be provided to the contrary by bye-law, subject to the payment of these expenses, the balance shall in each year be applied for the purposes of any pilots' benefit fund established in the district; and so far as not required for that purpose shall be applied for the benefit of pilots in such manner as may be determined by the pilotage authority, with the approval of the Board of Trade.

" (3) A separate account shall be kept by the pilotage authority who administer a pilots' benefit fund of all moneys received by them as payments to that fund, or for the benefit of that fund; and money standing to the credit of that account shall not be applicable to any purpose other than the purposes of the fund."

Section 23 provided power to the pilotage authority to grant pilotage certificates to masters and mates of vessels after examination, etc.

" 49. (1) The following persons shall be liable to pay pilotage dues for any ship for which the services of a licensed pilot are obtained, namely, (a) the owner or master; . . . (b) as to pilotage outwards, such consignees or agents as have paid or made themselves liable to pay any other charge on account of the ship in the port of her departure, and those dues may be recovered in the same manner as fines of like amount under the

Merchant Shipping Act, 1894; but the recovery shall not take place until a previous demand has been made in writing.” *Samuels J.*
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The following are the material provisions of the Pilotage Orders Confirmation (No. 2) Act, 1920 (10 & 11 Geo. 5, c. civ):—

“ 1. The Pilotage Orders set out in the schedule hereto shall be and the same are hereby confirmed and all the provisions thereof shall have full validity and force.

“ 2. This Act may be cited as the Pilotage Orders Confirmation (No. 2) Act, 1920.”

The following are the provisions of the Dundalk Pilotage Order made under the Act:—

“ DUNDALK PILOTAGE ORDER.

“ 1. The limits of the Dundalk Pilotage District (hereinafter referred to as ‘ the Pilotage District ’) shall be the waters of the harbour and bay of Dundalk between the bridge of Dundalk and an imaginary line drawn between Dunany Point and Cooley Point in the county of Louth.

“ 2. The pilotage authority for the pilotage district (hereinafter referred to as ‘ the Authority ’) shall be the Dundalk Harbour Commissioners as constituted by the Dundalk Harbour and Port Act, 1855 (hereinafter referred to as ‘ the Act of 1855 ’).

“ 3. Pilotage shall be compulsory within the Pilotage District.

“ 4.—(1) There shall be constituted a pilotage committee (hereinafter referred to as ‘ the committee ’) of the Authority consisting of seven members appointed and elected as follows:—

“ (a) Five members appointed by the authority of whom three shall be members of the Dundalk Harbour Commission one being nominated as chairman and two shall be persons registered at the port of Dundalk as shipowners or persons entitled as shareholders in shipping companies to vote at the election of commissioners under the Act of 1855 such two last-mentioned members to be appointed in preference from amongst the Dundalk Harbour Commissioners:

“ (b) Two members elected in manner hereinafter provided by the pilots licensed for the pilotage district (hereinafter referred to as ‘ the licensed pilots ’) from among persons who either are or have been licensed pilots for the Pilotage District.

“ (2) The members of the committee shall be appointed and elected respectively in manner in the schedule hereto provided.

“ 5. The authority may delegate to the committee any of their powers or duties under the Pilotage Act of 1913. The decisions of the committee on matters so delegated to them shall not require confirmation by the Authority but the committee shall report their proceedings to the Authority.

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“ 6.—(1) The chairman if present shall preside at every meeting of the committee. If the chairman is absent at any meeting such other member as the members then present choose shall preside.

“ (2) Every question at a meeting of the committee shall be decided by a majority of votes of the members of the committee present and voting on that question and in the case of equality of votes the person presiding at the meeting shall have a second or casting vote.

“ (3) The quorum of the committee shall be four.

“ (4) No member of the committee shall take part in any proceedings of the committee relating to any question affecting himself personally.

“ (5) Subject to the provisions of this Order the committee may regulate their own procedure.

“ (6) No act or proceeding of the committee shall be invalid on account of any vacancy in the number of the committee at the time of such act or proceeding or on account of the appointment or election of any member having been defective.

“ 7. Members of the committee shall hold office from the date of their appointment or election respectively until such time as their successors may be appointed or elected respectively.

“ 8. Members of the committee going out of office may be re-appointed or re-elected respectively.

“ 9. The Authority may out of any moneys coming into their hands as harbour authority under the Act of 1855 without prejudice to any other of their powers pay the whole or any part of the administrative expenses incurred by them as pilotage authority and may also contribute towards any pilots' benefit fund established in the Pilotage District such sums not exceeding £150 in any year as they think fit.

“ 10. Separate accounts shall be kept by the Authority of all moneys received and expended by them in connection with the pilotage service.

“ 11. In addition to the powers of the Authority to make bye-laws regulating the system to be adopted for the supply of pilots they may from time to time if it shall appear desirable so to do build purchase or hire and employ in the pilotage service one or more pilot cutters and may demand such sum of money from the licensed pilots for the use thereof as the Authority may think fit.

“ 12. Sections 87 to 99 of the Act of 1855 and any other enactment or order relating to pilotage in the Pilotage District shall cease to have effect and shall for the purposes of section 59 of the Pilotage Act, 1913, be deemed to be superseded.

“ 13. This Order shall come into force on the day when the Act confirming this Order is passed.

“ 14. This Order may be cited as the Dundalk Pilotage Order, 1920.

“ SCHEDULE.

“ With respect to the appointment and election of the members of the committee the following provisions shall have effect (that is to say):—

“ 1. The persons to be appointed by the Authority as members of the committee shall be chosen at the first meeting of the Authority held after their annual election in the year 1920 and each year thereafter.

“ 2.—(1) The members to be elected by the licensed pilots (hereinafter referred to as ‘ the pilot members ’) shall be elected at meetings of the licensed pilots which shall take place in the month of September in the year 1920 and each year thereafter at a time and place to be fixed by the Authority or failing them by the Board of Trade and advertised ten days at least before the day appointed for such election in one or more of the newspapers published and circulating in the town of Dundalk.

“ (2) The Secretary of the Authority or failing him some other person to be appointed by the Authority shall be the chairman of the meeting and the returning officer and shall preside at and regulate the proceedings at such meeting.

“ (3) Every licensed pilot shall be entitled to attend or to be represented at the meeting and to take part and vote in each election of pilot members thereat but this provision is not to authorise attendance to the prejudice of the pilot service.

“ (4) Candidates for the office of pilot member shall at such meeting be nominated and seconded by licensed pilots and if the number of persons so nominated does not exceed two the persons so nominated shall be deemed to be duly elected but if the number of persons nominated exceeds two the election shall be decided by the majority of the licensed pilots present or represented at the meeting.

“ (5) Any licensed pilot not present at any election meeting may by writing under his hand appoint any licensed pilot as proxy to represent him provided that all instruments in writing appointing such proxy shall be lodged with the Authority not later than the day preceding the day of the meeting.

“ (6) Every licensed pilot present or represented at any election shall be entitled to two votes but shall not give more than one vote for any one candidate.

“ (7) The chairman of the meeting shall as soon as may be after the election certify in writing to the Authority the name or names of the person or persons elected to be pilot members and all such persons shall thereupon become members of the committee.

“ (8) In case there is a failure to elect a pilot member at the first or any subsequent election the Board of Trade may appoint any licensed pilot to fill the vacancy and such person shall hold office as though he had been elected under the provisions of subsections (1) to (7) of this section.

“ (9) The costs charges and expenses of and preliminary

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and incidental to the election of pilot members shall be paid by the Authority.

“ 3. In the event of any vacancy among the appointed or elected members of the committee arising otherwise than by effluxion of time the vacancy shall be filled as soon as may be thereafter in the manner prescribed for the annual appointment or election but any person so appointed or elected shall hold office only until the next annual appointment or election.”

The following are the material provisions of the bye-laws made by the Dundalk Harbour Commissioners:—

“ INTERPRETATION.

“ 1. In these Bye-laws

“ ‘ The Pilotage District ’ means ‘ the Dundalk Pilotage District,’ as defined in the Dundalk Pilotage Order, 1920, namely:—The waters of the Harbour and Bay of Dundalk between the Bridge of Dundalk and an imaginary line drawn between Dunany Point and Cooley Point in the County of Louth.

“ ‘ The Pilotage Authority ’ means the Pilotage Authority for the Dundalk Pilotage District.

“ ‘ The Pilotage Committee ’ means the Pilotage Committee appointed under the Dundalk Pilotage Order, 1920.

“ LICENSING OF PILOTS.

“ 2. A person shall not be licensed as a Pilot unless or until he satisfies the following conditions:—

“ (a) He is a natural born British subject and the son of parents both of whom were at the time of his birth either natural born or naturalised British subjects;

“ (b) He is not more than 40 years of age at the time of a license being granted to him;

“ (c) He has satisfied the Pilotage Authority that he possesses the qualifications detailed in Bye-law 3.

“ DUTIES OF PILOTS.

“ 12. The Pilot Master, who shall be the Harbour Master of Dundalk for the time being, will keep a rota assigning to each Pilot his turn of duty, and any Pilot boarding a vessel out of his turn shall be liable to a penalty not exceeding £5.

“ 13. Each Pilot shall board an outgoing vessel when directed by the Pilot Master, and shall use his utmost endeavour to approach and board an incoming vessel when so directed, and for any breach of this Bye-law shall be liable to a penalty of £5.

“ 14. Every Pilot ordered to an outward bound steamer shall repair on board in sufficient time before such vessel shall leave the Dock or Port to ascertain if the vessel be ready for sea, and if not, when his services will be required, and if ready, shall then remain on board, and if not ready, shall proceed on board when required and shall then remain on board and give directions for the management of such vessel, generally fulfilling the

requirements of these Bye-laws, until she is safely outside the bar of Dundalk Harbour, and in default of doing so shall for every such offence be liable to a penalty not exceeding £5 or to suspension or dismissal.

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“ PILOTAGE RATES.

“ 39. If in consequence of the hoisting of a signal for a pilot by any vessel a pilot boat shall have put off and approached or made towards such vessel, the Master, Owner or other person in command of such vessel shall be deemed to have taken and employed a pilot and shall be subject to Pilotage charges whether he shall have taken such pilot on board or not.

“ 40. The Masters of all vessels liable to Pilotage rates shall pay the same to the Secretary of the Pilotage Authority or to the Harbour Master or to some person authorised on their behalf and not to the pilots employed.

“ 41. All applications for a reduction or refund of the Pilotage Rates shall be made within one month from the date of the Pilots' service in respect of which same may be claimed, otherwise such application shall not be entertained.

“ POOLING OF PILOTAGE DUES.

“ 45. The Pilotage dues earned by the licensed pilots shall be pooled, and after the deduction provided for in Bye-law 47 shall be distributed in such manner as the Pilotage Committee shall determine.

“ PILOTS' BENEFIT FUND.

“ 46. The Pilotage Authority shall establish a Pilots' Benefit Fund into which they shall pay a sum not exceeding £150 in any year out of any moneys coming into their hands as Harbour Authority, and also the contributions on the Pilotage dues earned by the licensed pilots provided for in Bye-law 47, and also the contribution by the Owners of ships provided for in Bye-law 48.

“ 47. A proportion of the Pilotage dues received by the Pilotage Authority amounting to ten per cent. shall be deducted by them and shall be paid into the Pilots' Benefit Fund.”

SAMUELS J., having stated the facts and pleadings, continued:—

The facts are not in dispute. Under the defendants' bye-laws, approved by the Board of Trade, the plaintiffs are licensed pilots on the rota for service on outgoing vessels, and bound to board such vessels when directed by the pilot master and tender their services under a penalty of £5 for any breach of such duty. Messrs. Lockington & Co. are the owners of two steamships which constantly ply to and from the port of Dundalk. Neither the masters nor mates of these vessels are licensed pilots for the Dundalk district. Messrs. Lockington have constantly refused to carry pilots in their vessels. The plaintiffs, in accordance

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with the bye-laws of the pilotage district under the direction of the defendants, the pilotage authority, given through the pilot master, have each, according to his turn on the rota of pilots for duty, gone aboard the vessels of Messrs. Lockington in due time before the vessels left for sea and offered their services as pilots; these offers of services have been invariably refused; and the plaintiffs have handed in the regulation dockets on each occasion showing their attendance on board and the refusal by the masters of Messrs. Lockington's ships to employ them. An account has been kept by the defendants of these rejected offers of pilotage and of the amount of fees that would have been earned had the ships carried the pilots, and demands for pilotage rates have been regularly made by the defendants in their account for harbour dues and other port rates furnished to Messrs. Lockington, who have always struck out the amount of the pilotage rates and refused to pay them. For instance, on November 16th, 1920, an account for £119 4s. 6d. was furnished by Messrs. Lockington, including £9 11s. 3d. pilotage fees, and Messrs. Lockington sent a cheque for £109 13s. 3d., striking out the balance of £9 11s. 3d. on the ground that they had not obtained the services of any pilots. The defendants, thus defied by Messrs. Lockington, have not proceeded in any way, either by seeking to enforce fines against the masters of the offending ships or by any action against the owners of the vessels to enforce the Pilotage Act, 1913, in the case of Messrs. Lockington, or to prevent their vessels from being navigated within the pilotage district without employing any licensed pilots. The plaintiffs say that they have a very substantial pecuniary interest in the enforcement of compulsory pilotage in the pilotage district; that, in fact, their subsistence depends on it; and that if the defendants had enforced the Compulsory Pilotage Act in the case of Messrs. Lockington considerable sums would have been payable to the defendants for pilotage dues, the greater portion of which would have been pooled, paid into the pilot fund, and distributed among them as licensed pilots of the port, and other portion of which would have been applied for the local Pilots' Benefit Fund in accordance with the Pilotage Act, 1913.

Under sect. 11, sub-s. 1, of the Pilotage Act, 1913, every ship (other than an excepted ship), while navigating in a pilotage district in which pilotage is compulsory for the purposes of entering, leaving, or making use of any port in the district . . . shall be either (a) under the pilotage of a licensed pilot of the district, or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district. Messrs. Lockington's vessels are not excepted vessels within the section, and (as above stated) neither their masters nor mates possess pilotage certificates for the district. Their vessels have regularly navigated the pilotage district of Dundalk without any licensed pilots, and Messrs. Lockington have consistently contravened the Act, and have paid no pilotage dues for their vessels.

Sect. 11, sub-s. 2, of the Pilotage Act, 1913, provides that if any ship (other than an excepted ship), in circumstances in which pilotage is compulsory, is not under pilotage after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilot dues that could be demanded for the conduct of the ship.

This section does not impose any penalty on the owner of the vessel, nor does any other section make the owner liable to a fine or other penalty for directing or allowing his vessel to be navigated without a licensed pilot.

The defendants contend that the statutory remedy given by this section, viz., to take proceedings to fine the master, is an exclusive remedy; and that no proceedings could be taken by them as the pilotage authority to restrain the owners, Messrs. Lockington, from plying with their vessels in the Dundalk pilotage district, without carrying a licensed pilot. They further contend that they are not under any legal obligation as the pilotage authority to proceed against the masters; that the pilots themselves can as common informers proceed against the masters; and that under sect. 49 of the Pilotage Act, 1913, the owners are not liable to pay pilotage dues unless the services of a licensed pilot were obtained, which they have not been in the case of Messrs. Lockington's vessels.

The defendants contend that in any event they as pilot authority have no duty cast upon them, so far as the pilots are concerned, to enforce the Act either against the masters or against the owners. Their contention amounts to this: that, though they are constituted a statutory authority, with great and important duties imposed on them, and though they have exclusive jurisdiction over the pilotage district, and though the pilots must act in accordance with their bye-laws, they themselves are under no liability to the pilots to carry out their statutory obligations; and that, though Dundalk is by Act of Parliament a compulsory pilotage district, to be administered as such by them, they can, so far as the pilots are concerned, permit it to be used by the owners and masters of particular vessels as a district in which pilotage is not compulsory. If this construction is correct, the defendants could give undue privileges to particular owners, and practically reduce the provisions of the Pilotage Act to a nullity by neglecting to enforce it. I do not agree with the contention of the learned counsel for the defendants that they have no means of enforcing as against Messrs. Lockington the obligation to carry licensed pilots on their vessels navigating within the defendants' district. Even were the penalties recoverable by summary jurisdiction imposed on the owners, as they are upon the masters of vessels violating the compulsory pilotage regulations, the defendants as the pilot authority could (apart from any other remedy) compel by injunction the observance on the part of the owners of the statutory obligation to carry licensed

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pilots. It may possibly be that the pilotage authority should, if they proceed by injunction, sue as relators through the Attorney-General; but I am not to be taken as deciding whether, having regard to their particular position under the Act as pilotage authority, it would be necessary for the Attorney-General to be a party. It is, however, in my opinion, clear that there is not, as is contended, only one remedy open, viz., the imposition of fines upon the masters for the enforcement of the statutory duty to carry licensed pilots. The owners who habitually violate these statutory obligations may be restrained by injunction from permitting their ships to be navigated without licensed pilots: *Attorney-General v. Ashborne Recreation Ground* (1); *Devonport Corporation v. Tozer* (2); *Attorney-General v. Wimbledon House Estate Co., Ltd.* (3); *Attorney-General v. Appleton* (4). And there are doubtless other remedies open to the pilotage authority against owners who deliberately violate the statutory provisions relating to the district, and are, practically, in so doing, trespassers in the port.

Are the defendants then liable to be sued by the plaintiffs in damages for the loss of pilotage fees incurred by the plaintiffs through the neglect of the defendants to enforce the Pilotage Act, 1913? The law is plain that whosoever undertakes the performance of, or is bound to perform duties imposed by the assumption of an office is liable for injuries caused by the negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them: *Gilbert v. Corporation of Trinity House* (5). To quote Lord Watson in *Sanitary Commissioners of Gibraltar v. Orfila* (6): "Their Lordships do not wish to suggest that commissioners or other public trustees who have no pecuniary interest in the trust which they administer can escape liability when they are negligent in the active execution of their trust. It is an implied condition of statutory powers that when exercised at all they shall be executed with due care. But in the case of mere non-feasance no claim for reparation will lie except at the instance of a person who can show that the statute or ordinance under which they act imposed upon the commissioners a duty towards himself which they negligently failed to perform. In the *Mersey Docks Case* (7) it was held that the trustees owed to all shippers and ship-owners using the docks and paying toll for the accommodation the statutory duty of keeping the docks and their entrances in a safe condition; and further, that the fact that the trustees held the tolls which they collected, not for their own purpose, but for the public interest, did not exempt these funds from liability for damage arising from the neglect of that duty. Lord Blackburn, in delivering the opinion of the

(1) [1903] 1 Ch. 101.

(2) [1903] 1 Ch. 759.

(3) [1904] 2 Ch. 34.

(4) [1907] 1 I. R. 252.

(5) 17 Q. B. D. 795.

(6) 15 A. C. 400, at p. 411.

(7) L. R. 1 H. L. 93.

consulted judges, stated the proper canon of construction to be that 'in the absence of something to show a contrary intention the Legislature intends that the body—the creature of the statute—shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing.' "

Under the Pilotage Act, 1913, penalties are not imposed on the pilot authority itself for misfeasance or neglect of duty. A person injured by their negligence is entitled to sue them at common law for any wrong which gives him a cause of action. In the present case the statute contains general provisions for the benefit of the pilots; the due administration of these provisions is a duty imposed by the statute on the pilotage authority. If the pilotage authority, through the neglect of their obligations to enforce compulsory pilotage, cause particular injury to an individual or a class of individuals who are intended to be benefited by the Act, that individual or class can make the pilotage authority liable in an action.

It is clear in the Act that the pilots have a great pecuniary interest in the enforcement by the defendants of compulsory pilotage in the district. They earn their living by acting as such pilots. Pilotage Orders, made under sect. 7 of the Pilotage Act, 1913, can only be made subject to provision being made for compensation to pilots for any loss or damage which may be incurred by them in consequence of a rearrangement of a pilotage district. Under sect. 17, sub-s. 9, a pilotage authority can fix a limit to the number of pilots to be licensed, determine the system to be adopted with regard to their supply and employment, fix the rate of payments to be made for their services as pilots, define the conditions on which pilotage may be payable on different scales, and provide for the distribution and collection of pilotage dues, provide for the pooling of the dues earned by the pilots, and provide for a deduction from the sums received by pilots of any sums required for the administrative expenses of the authority or any contributions required for any fund established for the payment of pensions or other benefits for pilots, their widows, or children by creating a pilots' benefit fund. The authority can also provide for the examination of masters and mates applying for pilotage certificates for the district, and prohibit the granting of certificates to masters or mates who do not hold at least a mate's certificate of competence under the Merchant Shipping Act. They can require the owners of ships whose masters or mates hold pilotage certificates to contribute towards the pilot fund of the district. By sect. 21 all receipts of a pilotage authority (other than on behalf of and paid to any pilot, or received as direct payments to the pilots' benefit fund) shall be paid into a separate account or fund, to be called the pilot fund or account of the pilotage district; and, by sub-s. 2 of that section, all expenses incurred by a pilotage authority in the exercise of their powers and duties shall be paid out of the pilot account or fund, and, subject to such payment,

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the balance shall be applied to the purposes of any pilots' benefit fund established for the district, and so far as not required for that purpose shall be applied for the benefit of the pilots in such manner as the pilotage authority determine, with the approval of the Board of Trade.

Again, the pilots have a series of statutory rights and obligations conferred or imposed on them which are regulated and controlled by the pilotage authority and defined by their bye-laws. It is unnecessary to refer to the sections of the Act in detail. The licensed pilots are persons who under the statute are specially provided for, and who have peculiar rights and obligations, and have an interest, quite distinct from that of the general public, in the due administration and enforcement by the pilotage authority of the Pilotage Act, 1913.

On the other hand, the pilots are subject to heavy penalties if they do not perform their duties under the Act and observe the directions of the pilotage authority. To take an instance relevant to the present action, under sect. 48, sub-s. 11 (g), any licensed pilot who refuses or wilfully delays to pilot any ship when required to do so by the master, owner, or consignee thereof, or by any officer of the pilotage authority, shall, in addition to any liability for damages, be liable in respect of each offence to a fine not exceeding £100. By bye-law 13 each pilot shall board an outgoing vessel when directed by the pilot master, and for any breach of this bye-law shall be liable to a penalty of £5; and, by bye-law 14, every pilot ordered to an outward-bound steamer shall repair on board in sufficient time before such vessel shall leave the dock or port to ascertain if the vessel is ready for sea, and if and when his services will be required, and if ready shall remain on board, and if not ready shall proceed on board when required, and shall give directions for the management of the vessel generally, fulfilling the bye-laws, until she is safely outside the bar of Dundalk Harbour, and in default of so doing shall for every such offence be liable to a penalty not exceeding £5, or to suspension or dismissal.

It was proved that the several plaintiffs, under the direction of the pilot master, attended and boarded the outgoing vessels of Messrs. Lockington, whether they left by night or day, thus, as far as in them lay, being prepared to carry out their duty under the bye-law; but their services were refused. The defendants had these refusals reported to them on each occasion, and an account has been kept of them; but further than keeping such account the defendants did not proceed, and they have declined or neglected to take any action against the owners or masters of these vessels, which invariably left the port without having on board any pilot, or any master or mate licensed as a pilot for the district. The defendants recognized their duty so far as to require the plaintiffs, the pilots, to attend the outgoing vessels, and, through their proper officer, ordered them to do so. Had the plaintiffs neglected to do as they were ordered they could have been fined, suspended, or dismissed by the defendants. In

my opinion the defendants, as the pilotage authority, should not have been content to direct the plaintiffs to proffer their services; they should also have taken steps to compel the owners and masters of these vessels to carry pilots; and, through their not having done so, they are, in my opinion, liable to the plaintiffs for the breach of the duty imposed on them by the statute.

The plaintiffs cannot themselves collect the pilotage rates. Under bye-law 40 the masters of all vessels liable to pilotage rates shall pay the same to the secretary of the pilotage authority or to the harbour master, or to some person authorized on their behalf, and not to the pilot employed. It was the duty, therefore, of the defendants to carry out the Act, and to see that the pilotage dues were enforced and collected, and when collected paid or applied in accordance with the Pilotage Act to the pilots or for their benefit. This was a duty they owed to the plaintiffs, just as it was a duty the plaintiffs owed the defendants to be prepared to board, as they did, the outgoing vessels in accordance with the directions of the pilot master. For the breach by the defendants of their duty to enforce the Act they are, in my opinion, liable to the plaintiffs.

But it is contended that the defendants cannot recover the pilotage dues from the offenders, Messrs. Lockington, as sect. 49, sub-s. 1, provides that the owner or master shall only be liable to pay pilotage dues for any ship for which the services of a licensed pilot were obtained; and that, as Messrs. Lockington and the masters of their vessels did not obtain the services of a licensed pilot, having refused to accept them, pilotage dues are not payable by them. Assuming that this is correct, yet it does not preclude liability, either on the part of the defendants to the plaintiffs, or of Messrs. Lockington to the defendants. Once the services were refused, the pilotage authority should, in my opinion, have carried out their obligation and enforced the penalties provided by the Act against the masters, and taken any other steps necessary to prevent the flagrant violation of the Pilotage Act by the owners; and it is not, in my opinion, any answer to the plaintiffs' claim here to say, in effect, to them, "It is true we ordered you to tender your services as pilots, but, as the owners and masters of the ships declined them, they are not liable to pay dues, and we are not under any liability to you accordingly." In my opinion the defendants are liable to pay damages to the plaintiffs for their breach of duty in not enforcing the Act, and the measure of damages is the amount of pilotage fees that could have been earned by the plaintiffs had the vessels carried the licensed pilots. The amount can be readily ascertained, as the account of such fees has been kept by the defendants. The damages cannot be carried further back than six months before action brought, having regard to the Public Authorities Protection Act.

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I find as a fact that the defendants, as the pilotage authority of the Dundalk pilotage district, have, during six months before action brought, neglected and refused to enforce the Acts and bye-laws relating to compulsory pilotage in their district in the case of certain ship-owners and masters of vessels plying in the district to the prejudice of the plaintiffs, and I shall direct an inquiry as to damages suffered by the plaintiffs owing to such neglect and refusal by the defendants. The plaintiffs are entitled to their costs against the defendants.

Solicitor for the Dundalk Harbour Commissioners: *C. J. M'Gahan.*

Solicitors for the plaintiffs: *Messrs. Johnson & Roe.*

Solicitors for Messrs. Lockington: *Messrs. Ward & Hamill.*

C. N. K.

RUDD v. REA (1).

(1920. No. 537.)

Appeal.
(I. F. S.)
1923.

Reservation—Growing timber—“Use of all roads and passes” for removal of timber—Licence to erect sawmill—Implied rights—Manufacture of sleepers, etc.—Time for removal of timber.

Jan. 17, 18,
19, 22.
March 26.

Under a contract for the sale by the owner of land of the timber growing on it, the purchaser was given “the use of all roads and passes” for the removal of the timber which was to be effected within a period of five years. Verbal permission was given by the vendor to the purchaser to erect two sawmills on the lands to facilitate him in carrying out the contract.

Held (affirming Powell J.), that the purchaser was not entitled to use a sawmill erected by him on the lands for the purpose of manufacturing articles for sale, and that the purchaser was not entitled to remove the timber by a mode of traction which so damaged the roads on the vendor's land as to make them incapable of being used for the ordinary purposes of the owner's dwelling-house and farm.

APPEAL by the defendant from certain parts of an order made by Powell J. on April 19th, 1921.

The appeal was from so much of said order as:—

1. Restrains the defendant, his servants, or agents from using the sawmill erected at the entrance to the barrack avenue referred to in paragraph 3 (a) of the statement of claim for the purpose of manufacturing sleepers, brush-heads, etc., or from hauling or piling logs for such purposes on the avenue adjoining the said sawmill, or for any purpose other than the purpose of facilitating the removal of timber.

2. Declares that the preparations made by the defendant for the erection and use of the second sawmill referred to in paragraph 3 (b) of said statement of claim were in excess of the requirements of the defendant, and that it was not necessary to clear the land to the extent of an acre, or to make an exit of the width, or to level the place to the extent to which it had been levelled for the purpose of making an exit from said second sawmill.

3. Directs an inquiry as to what damages the plaintiff has sustained by reason of the excessive clearing of the land, excessive width of the exit, and excessive levelling of the fence done by the defendant, his agents, or workmen in preparation for the erection of said second sawmill.

4. Restrains the defendant, his servants, and agents from destroying, injuring, or damaging the avenues and farm roads on the lands referred to in said order, and the drain running under or alongside the main avenue on said lands so as to render them as to said avenues and roads incapable of being used for the ordinary purposes of the plaintiff's mansion-house and farm; and as to the said drain, incapable of being effectively used as such.

(1) Before MOLONY C.J., RONAN L.J., and SAMUELS J.

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5. Directs an inquiry as to the damages sustained by the plaintiff by reason of injury done by the defendant, his agents, and servants to said avenues and farm-roads in so far as that injury has rendered them incapable of being reasonably used by the plaintiff for the ordinary purposes of his said mansion-house and farm.

6. Restrains the defendant, his servants, and agents from holding public auctions on the plaintiff's said lands for the sale of timber.

7. Orders the defendant to pay to the plaintiff the costs of the action incurred by reason of the issues in regard to the afore-said matters.

The facts are stated in [1921] 1 I.R. 223.

Brown K.C., H. Wilson K.C. (with them *J. H. Robb K.C.*),
for the appellant :—

An express right was given to the plaintiff to erect and use sawmills on the land. Even if this right had not been expressly given, the contract for the sale of the growing trees implied a right to carry on all operations reasonably necessary to facilitate the removal of the timber from the lands. "The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side": "*The Moorcock*" (1), per Bowen L.J. Further on the same learned Judge says: "In business transactions . . . what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended, at all events, by both parties who are business men." From a business point of view a sawmill was absolutely necessary where a person had purchased a vast quantity of growing trees. In this case the defendant could not without the mill have removed the timber within the stipulated time. The sawing of the timber into sleepers and brush-heads was a perfectly reasonable user of the mill.

If the defendant is not allowed to use the avenues, he will not be able to remove the timber within five years. Under the contract he is expressly given "the use of all roads and passes"; and for the purpose of removing the timber he is entitled to employ the most modern means of traction. The plaintiff cannot derogate from his own grant. Where nothing is said in an agreement in regard to repairs, there is no obligation on either side to repair: *Jones v. Pritchard* (2).

[Other cases cited: *Hewitt v. Isham* (3); *Hext v. Gill* (4); *Dand v. Kingscote* (5); *Antrim v. Dobbs* (6); *M'Donnell v. Kenneth* (7).]

(1) 14 Pro. Div. 64, at p. 68.

(2) [1908] 1 Ch. 630.

(3) 7 Ex. 77.

(4) L. R. 7 Ch. App. 699.

(5) 6 M. & W. 174.

(6) 30 L. R. Ir. 424.

(7) 1 Ir. C. L. R. 113.

Jellett K.C., Wood K.C. (with them *Geoghegan*), for the respondent :—

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In construing a contract such as we have here the question is whether, taking into account the nature of the subject-matter and the object in view, one is to look at it from the point of view of the defendant, and the defendant alone, or whether the true principle is not to consider the interests of both parties. Neither express nor implied authority was given to the defendants to use sawmills on the lands for manufacturing purposes. As to the avenues, the licence relied on did not mean that they were to be destroyed. In the surface cases it is laid down that without express authority to do so the surface cannot be destroyed. "Whenever minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support unless the language of the instrument regulating their rights or other evidence clearly shows the contrary. In order to exclude a right to support the language used must unequivocally convey the intention either by express words or by necessary implication": *Butterknowle Colliery Company v. Bishop Auckland Industrial Co-operative Company* (1), per Lord Loreburn L.C. In ascertaining what passed by a conveyance evidence may be given of the state of the property at the time it was conveyed and of the mode in which it had been enjoyed: *Hall v. Lund* (2). At the time of the sale of the trees the avenues and roads of the plaintiff were in good condition. Does the contract mean that all farming operations are to be stopped, and all access to the mansion prevented by the defendant's operations upon the lands?

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[Other authorities cited: *Ingram v. Morecraft* (3); *Reilly v. Booth* (4); *Hext v. Gill* (5); *The King v. Ward* (6).]

Brown K.C., in reply.

MOLONY C.J. :—

By an indenture dated the 10th day of January, 1920, the plaintiff purchased the fee-simple interest in the lands of Collon, in the County of Louth, in the Barony of Ferrard, containing 942 acres 1 rd. and 33 perches; and also in the lands of White River, containing 8 acres 3 rds. and 37 perches, statute measure, or thereabouts; but the conveyance expressly excepts and reserves unto the assigns of James Lyons all the timber growing on said lands and premises.

It appears that on the 25th July, 1919, Lord Massereene and Ferrard, who was then owner of the said lands, known as Oriel Temple, agreed to sell same to James Lyons for a sum of £26,200. Having obtained this agreement, James Lyons, on the 1st September, 1919, entered into an agreement with the defendant for

(1) [1906] A. C. 305, at p. 309.
(2) 1 H. & C. 676, at p. 681.
(3) 33 Beav., at p. 49.

(4) 44 Ch. D., at p. 26.
(5) L. R. 7 Ch. App., at p. 714.
(6) 4 Ad. & E. 384, at p. 406.

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the purchase of the growing timber on the said lands for the sum of £15,000. This agreement, which has given rise to the present action, is in the following terms:—"I, James Lyons, agree to sell to Mr. Samuel Rea, of Antrim, all the growing timber on the lands of Oriel Temple demesne for the sum of £15,000, to be paid this day. I further agree to allow the period of five years from this date for the removal of said timber and use of all roads and passes. In the event of the purchaser not being able, by reason of labour trouble, to remove said timber within said period, a further period not exceeding two years to be allowed."

The agreement was duly signed by James Lyons, and the defendant paid to Lyons the purchase money of £15,000.

James Lyons, on the following day—2nd September, 1919—transferred the benefit of his contract with Lord Massereene, subject to the sale of the timber to the defendant, to P. M. Ging, in consideration of the sum of £2,000. Ging, on the 27th September, 1919, sold the premises to Thomas J. O'Neill for £9,800, and he, on October 3rd, 1919, agreed to sell the premises to the plaintiff for £14,000, and the conveyance was duly executed from Lord Massereene and the intervening purchasers to the plaintiff.

When the plaintiff went into possession he found the defendant actively engaged in the cutting of timber, and very shortly disputes of a serious character arose between them as to their respective rights under the agreement.

On the 20th April, 1920, Mr. M. J. O'Connor, the plaintiff's solicitor, wrote to the defendant making specific complaints in reference to the erection of a sawmill and the proposed erection of another on the lands, and also complaining of an auction of timber having been held on the lands and the unreasonable way in which timber had been removed. Correspondence went on for some time without any satisfactory result, the plaintiff complaining that the defendant was using the lands as a manufacturer of timber and not as a purchaser of growing timber; and the defendant asserting that in what he had done he was acting within his rights as the purchaser of the timber.

Ultimately, on 19th May, 1920, this action was commenced, claiming, amongst other things, that the defendant, in excess of his rights under the agreement and without permission of the plaintiff, had trespassed on the said lands.

The particulars enumerated eleven causes of action against the defendant, numbered (a) to (k) inclusive; and the plaintiff claimed an injunction restraining the defendant, his servants, or agents from doing or continuing the several acts complained of, and also an inquiry as to damages.

It is not necessary to refer in detail to the matters complained of in the statement of claim, as most of them have been dealt with by Mr. Justice Powell, and are not the subject of the present appeal.

The matters, however, complained of, which are the subject

of the present appeal, are set out in the particulars as (a), (b), (e), and (f), i.e. :—

(a) Erected and maintained a sawmill at the entrance to the Barrack Avenue, and erected therein saw-benches and saws and a steam engine, and worked the said mills for the purpose of manufacturing sleepers, brush-heads, etc., therein, and employed a large staff therein, and hauled and piled logs and manufactured goods on the avenue adjoining the mill.

(b) Cleared about an acre of land in the demesne of shrubs and undergrowth as a site for a second sawmill, and cut an entry through the boundary fence on to the public road, and left same permanently open, and dug into the plaintiff's lands, and also interfered with the free outlet of the water of the lake on the said demesne, and proceeded to erect a second sawmill on the said site.

(c) The defendant employs upon the said avenues, passes, and lands a number of steam traction engines, heavy monkeys, light monkeys, motor and steam lorries, also a caterpillar tractor. The said avenues and passes are unsuitable, and were not constructed for such traffic; and the defendant, by a reasonable exercise of his rights—by the use of horses and timber carts, of which he employs a number—could remove the growing timber on the demesne within the time limited by the contract.

(f) By the use of the said tractors the surfaces of the avenues have been so destroyed as to be impassable. The drains thereon and thereunder have been broken down, and the surfaces of the avenues, lands, and lawns have been torn up. The defendant has failed to repair the damage done to the lands, avenues, passes, and drains.

The defendant in his defence has traversed the several causes of action, and says further that the avenues and passes referred to were not, nor was any of them, unsuitable for such traffic as the defendant put on them, and that the method adopted by the defendant for the removal of the said timber was the ordinary and proper method of removing timber of the size and weight of the said growing timber.

At the trial before Mr. Justice Powell, which lasted some fifteen days, many witnesses were examined on both sides; and Mr. Justice Powell, on the 19th April, 1921, delivered judgment, in which he fully, and, indeed, exhaustively, dealt with the evidence and contentions on both sides. With many of the matters in his judgment and order the defendant does not quarrel, and he has limited his appeal to so much of the order as :—

1. Restrains the defendant, his servants, or agents from using the sawmill referred to in paragraph 3 (a) of the statement of claim for the purpose of manufacturing sleepers, brush-heads, etc.; and from hauling or piling logs for such purpose on the avenue adjoining the said sawmill, or for any other purpose than the purpose of facilitating the removal of timber.

2. Declares that the preparations made by the defendant for

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the erection and use of the second sawmill referred to in paragraph 3 (b) of the said statement of claim were in excess of the requirements of the defendant, and that it was not necessary to clear the land to the extent of an acre, or to make an exit of the width, or to level the fence to the extent of which it had been levelled for the purpose of making an exit from the said second sawmill.

3. Restrains the defendant, his servants, and agents from destroying, injuring, or damaging the avenues or farm roads on the lands referred to in the said order, and the drain moving under or alongside the main avenue on said lands so as to render them as to the said avenues and roads incapable of being used for the ordinary purposes of the plaintiff's mansion-house and farm; and as to the said drains, incapable of being effectively used as such.

It will now be necessary shortly to consider the evidence given at the trial, and to form a clear view as to the nature and extent of the defendant's operations, and how far they were justified by the rights which he had acquired under the agreement of cutting and removing the timber from the said lands and using the roads and passes for that purpose.

Mr. Justice Powell finds as a fact that sawmill No. 1 was erected and sawmill No. 2 partly erected by the express leave and licence of Mr. Lyons. This appears to be abundantly clear from the evidence of the defendant, who says that Mr. Lyons said that he would give him all the facilities he wanted—that he could have two sawmills or four sawmills. Mr. Brown has contended for the defendant that this gave him an express licence to erect and use sawmills for whatever purpose and in whatever manner he wished. It is conceded that the defendant was justified in using a sawmill for the purpose of facilitating the removal of timber; but there is no doubt that he used the sawmill not merely for this purpose, but also for the purpose of manufacturing articles for sale. It is unnecessary to refer to the evidence on this point given by Robinson, the plaintiff's steward, and the two experts examined for the plaintiff, Mr. Moran and Mr. Stedman, as it is admitted by the defendant himself that he used the sawmill for the purpose of making sleepers, brush-heads, and other articles. The defendant in his evidence has given an account of how he made the timber cut at the mill available for sale as sleepers, and that any wood that he did not use for sleepers and did not burn in the engine he utilized for the manufacture of brush-heads.

I have considered the evidence carefully on this point, and I agree with the conclusion which was arrived at by Mr. Justice Powell (1), where, after finding that sawmill No. 1 was worked for the purpose of manufacturing sleepers and brush-heads, etc., and that logs of timber and manufactured goods were piled on the avenue adjoining the mill for such manufacture, he said: "In my opinion this particular use of a sawmill is not authorised

by the express permission relied on, which, in my view, was given by way of facilitating the removal of the timber; and even if by the alleged implied terms of the contract a sawmill or sawmills might be erected as part of the plant, as stated by one witness, I do not think it could be maintained for the purpose of manufacturing timber into sleepers, scantlings, or brush-heads. I think this use would add a considerable burden to the lands of the plaintiff, involving the continuous piling of partially cut timber on the lands and considerable additional traffic through the gate and avenue of the plaintiff at that place; and I do not think that the defendant is entitled to leave for a considerable length of time timber piled upon the plaintiff's land." Upon this latter point Powell J. adopts, with approval, the observations of Baron Parke in *Hewitt v. Isham* (1), where he said that although a person has a right to enter land and cut trees at all reasonable times, if he leaves them on the land for an unreasonable time he does more than the law authorizes him to do.

Mr. Brown has strenuously contended that even if there was not an express licence, there was, by reason of the sale itself, a right to use the sawmill in the manner complained of; and he has relied on the case of "*The Moorcock*" (2), and particularly on the observations of Bowen L.J. at p. 68. Bowen L.J., having referred to the implication which the law draws from what must have obviously been the intention of the parties, says that in business transactions "what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transactions, or to emancipate one side from all chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

It seems to me that the "business efficacy" of the present transaction is given full effect to by holding that the authority which the defendant got was to do what was necessary to facilitate the removal of the timber from off the land, and not to facilitate the manufacture of the timber into articles of commerce on the lands.

As regards sawmill No. 2, it was never in fact completed, but the defendant carried out very elaborate preparations for that purpose, and cleared the land around the site to an extent of an acre and a half. Of course this might not be unreasonable in itself if the defendant had a right to manufacture timber and to pile the unmanufactured or manufactured articles on the land until such time as they could be treated in the sawmill or disposed of by sale; but it follows that if there was no right to manufacture, and the sawmill was only to be used for the purpose of facilitating the removal, there could be no necessity to clear the ground or to do the other acts which are complained of.

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(1) 7 Ex. 77, 79.

(2) 14 P. D. 64.

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On this point I think Powell J. has clearly summed up the situation at p. 241. He says: "I think that for that purpose (following the reasoning applicable to the erection of sawmill No. 1), in the course of the erection of sawmill No. 2, the defendant would be justified in clearing a reasonable site for the sawmill, even though it caused an injury to the plaintiff by the destruction of rhododendrons, etc., in reasonably making a trench for the purpose of draining the land upon which the sawmill stood, and of making a reasonable exit to the public road from the sawmill. I think the right to do this would follow from the express permission, but I do not think he was entitled to clear an acre and a half, thus depriving the plaintiff of a considerable quantity of land; nor was he entitled in my opinion to level the fence to the extent of twenty feet for the purpose of making an exit; nor in my opinion was he entitled to leave an exit of that description unprotected and unfenced."

I now come to the provisions of the order, which grants an injunction restraining the defendant from destroying, injuring, or damaging the avenues or farm roads on the lands; and it is, of course, around this part of the case that the principal controversies have arisen. It has been contended that in a case of this character, where the use of roads and passes is given for the purpose of removing large quantities of timber, that the defendant is entitled to use the avenues and passes with all modern appliances, including tractors, for removing timber, and that, if the necessary effect of so using the avenues and passes was to destroy or—as the phrase has been used in the case—to annihilate the avenues, that this was a necessary incident of the transaction, to which the owner of the soil was bound to submit. On the other hand, it is suggested that the contract must be reasonably interpreted, that it was never in the contemplation of the vendor to make what he retained an unmarketable commodity; nor was it in the contemplation of the purchaser that he could so destroy the avenues as to make them useless for the purposes of the dwelling-house on the lands or the farm. On this point I find myself in complete agreement with Powell J., at p. 239, where he says: "The defendant here is a timber merchant of great experience; presumably he inspected the demesne before he entered into the contract; he saw the avenues, passes, and farm roads; he bargained for a period of five years for the removal of the timber, and for the use of the avenues and passes. Did he imagine for one moment that he was requiring the owner to confer on him the right to destroy them, to render them useless to the owner for the purpose of his mansion-house and for the working of his farm? Did the owner intend to confer such a right on the defendant? I think the answer to both these questions is 'No.' Would a clause in this instrument providing that in carrying out his operations by whatever methods he chose to adopt the defendant should not destroy the avenues, farm roads, or fences of the owner of the property, or render them incapable of being used

by the owner of the property, be inconsistent with the instrument? I think not. In my opinion it is impossible to hold that the instrument here conferred a right on the defendant to annihilate the plaintiff's rights."

Many authorities have been cited, but I do not think it necessary to discuss them in detail. I have, of course, carefully considered all the authorities to which we have been referred, and particularly those relied on by the defendant, including *The Earl of Antrim v. Dobbs* (1); *Dand v. Kingscote* (2); *M'Donnell v. Kenneth* (3); *Hewitt v. Isham* (4); and I agree with the conclusion at which Powell J. arrived (p. 233), where he says: "I do not understand the decisions in these cases or any of them to lay down the principle as a matter of law that the owner of the soil has no rights, or that the licensee was entitled to ignore the owner's rights altogether, or that the licensee was entitled to annihilate the rights of the owner, or that a right was conferred on the licensee to inflict not only what Mellish L.J. in *Hext v. Gill* (5) describes as 'temporary damage,' but in addition, damage which would result in the annihilation of the plaintiff's rights and destroy the property of the plaintiff, depriving him of access to his house and the use of his farm rights, and causing 'serious, continuous, and permanent injury to the surface.' If the decisions go as far as that—and I do not think they do—then I think they would ignore the well-known principle expressed in the maxim, 'sic utere tuo ut alienum non laedas'; and still following the analogy between the present case and the case of the respective rights of the owner of the soil and the owner of mineral rights, they cannot, I think, be reconciled with the decisions in *Love v. Bell* (6), *Hext v. Gill* (5), or *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (7)—two of them decisions of the House of Lords, and one of them of the Court of Appeal in England."

The defendant does not deny that he has substantially injured the plaintiff's roads, but his case is that under his contract he is entitled to do so, and to destroy them so far as their utility to the plaintiff is concerned; or, as stated by Mr. Brown in the course of the argument, the defendant had the right to use the roads for the purpose of his contract, and, if necessary for that purpose, even to destroy them; and that if the necessary effect of using tractors, etc., on the roads was to destroy them, the plaintiff had no remedy.

I think that such a construction of the contract would be both unreasonable and unjust, and was never in the contemplation of the parties; and in a case such as this, where the Judge has found on the evidence that "serious, continuous, and permanent injury" has been done to these roads, and damage

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(1) 30 L. R. Ir. 424, 432.

(2) 6 M. & W. 174.

(3) 1 I. C. L. R. 113.

(4) 7 Ex. 77.

(5) L. R. 7 Ch. App. 699.

(6) 9 A. C. 286.

(7) [1906] A. C. 305.

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not only to their surface, but to their foundation, he was fully entitled to hold that such injury was unjustifiable in law, and that consequently an injunction should be granted to restrain the defendant from damaging the roads so as to make them incapable of being used for the ordinary purposes of the plaintiff's dwelling-house and farm.

In my opinion the decision of Mr. Justice Powell, so far as appealed from, was right, and consequently this appeal should be dismissed with costs.

RONAN L.J.* :—

I am of the same opinion. I have had the opportunity of reading the judgment of the Lord Chief Justice, and I concur in every word of it. I wish, however, to add a few words.

The first question is whether the user of the sawmill proved was lawful. Mr. Brown justified it on two grounds. First, he said it was reasonably necessary to do what was done to the timber in the sawmill in order to facilitate its removal. When the map of the lands was produced, it was discovered that the sawmill was within fifty yards or thereabouts of the boundary. Where the trees were felled was about half a mile away. The trees were removed in a certain state along that half mile to the sawmill. There was no hint or suggestion that there was any obstacle in the remaining fifty yards which would prevent their being removed in the same way. Half of the timber was carried in its original state to the road, and the other half underwent treatment in the sawmill. Therefore it is absurd to say that what was done at the mill was necessary to facilitate the removal of the timber from the lands. In his reply Mr. Brown made a different case. He then said that removal did not mean simply taking the timber off the plaintiff's lands to the public road, but that the operation which took place in the mill was intended to make more easy the removal from outside the plaintiff's lands to the defendant's factory or store. When I put it to him that this meant facilitating the exportation of the timber by train or steamer, he assented. In no sense was what was done to the timber at the mill necessary for its removal.

As to the use of the roads and avenues on the lands, can it be contended that the defendant was entitled to employ powerful lorries with traction engines for the purpose of removing entire trees? The meaning of the transaction was: the plaintiff was the owner of the estate; he might want to sell it or let it; the avenues had to be maintained; the raw material, the timber, had been sold to the defendant, and he was allowed to remove it from the lands.

SAMUELS J. :—

I concur. The defendant has appealed from so much of the judgment of Mr. Justice Powell as restrains him from using the sawmill at the Barrack Avenue entrance in the Oriel Temple.

* This judgment has not been revised by Ronan L.J.

demesne for purposes of manufacturing sleepers, brush-heads, etc., and declares that the preparation for the erection and use of the second sawmill and the extent of the site cleared and the width of the exit opened for it were in excess of the requirements of the defendant. He also has appealed from the injunction restraining him from so destroying or damaging the avenues and farm roads as to render them incapable of being used for the ordinary purposes of the plaintiff's mansion-house and farm.

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With regard to the sawmills, Mr. Justice Powell came to the conclusion and found as a fact on the evidence that sawmill No. 1 was erected, and sawmill No. 2 partly erected, by the express leave and licence of Mr. Lyons, who had purchased the mansion-house and demesne from Lord Massereene in July, 1919, and on the 1st September, 1919, had entered into an agreement in writing with the defendant to sell to him "all the growing timber on the demesne of Oriel Temple for £15,000, and further agreed to allow the period of five years from that date for the removal of the timber, and the use of all roads and passes." The agreement contains nothing about sawmills. There were intermediate assignments of the benefit of the contract with Lord Massereene by Mr. Lyons to a Mr. Ging, and by Mr. Ging to a Mr. O'Neill. They were made subject to the timber contract between Lyons and the defendant; and finally, on January 10, 1920, by a conveyance to which Lord Massereene, Mr. Lyons, Mr. Ging, and Mr. O'Neill were parties, the demesne and mansion-house and lands of Oriel Temple were vested in the defendant, Mr. Rudd, subject to the agreement of September 1, 1919, "whereby James Lyons sold to the defendant, Mr. Samuel Rea, all the growing timber on the lands of Mount Oriel demesne." This conveyance is silent as to any permission to erect sawmills. At the hearing counsel for the plaintiff objected to the admission of the evidence tendered to support the claim that the defendant was by the express licence given to him by Mr. Lyons entitled to erect the sawmills. In my opinion the evidence should not have been admitted; but no appeal has been taken by the plaintiff from Mr. Justice Powell's ruling; and having regard to the decision of the learned Judge upon the practical points at issue relating to the said sawmills, in which I fully concur, it is unnecessary to discuss now the question of the admissibility of the evidence.

Assuming, however, that permission was given, and that the plaintiff was bound by the permission given by Lyons to erect the sawmills, I concur with Mr. Justice Powell when he says: "In my opinion the particular use of the sawmill is not authorised by the express permission relied on, which in my view was given by way of facilitating the removal of the timber; and even if by the alleged implied terms of the contract a sawmill or sawmills might be erected as part of the plant (as stated by one witness), I do not think it could be maintained for the purpose of manufacturing timber into sleepers, scantlings, or

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brush-heads. I think this would add a considerable burden to the lands of the plaintiff, involving the continuous piling of partially cut timber on the lands, and considerable additional traffic through the gate and avenue of the plaintiff at that place; and I do not think the defendant is entitled to leave for a considerable length of time timber piled upon the plaintiff's land."

Whether a right to erect a sawmill or sawmills for the purpose of facilitating the removal ought to be implied in a contract for sale of growing timber would depend upon the fact whether, having regard to all the circumstances of the particular case, it would be reasonably necessary for the purpose of cutting and carrying away the timber. It is difficult, however, in the present case to come to the conclusion that the erection and use of the sawmills were reasonably necessary for the removal of the timber. Lord Justice Ronan called attention during the argument in this Court to the sites of the sawmills as shown on the map of the demesne. They are situate quite close to the exits from the demesne, and from half to three-quarters of a mile from the places where the substantial felling of the timber has taken place. It is therefore demonstrable that the sawing in the mills was not necessary for the purpose of removing the timber off the lands. The logs had only about fifty yards further to be carried to be cleared out of the demesne. If, therefore, the sawmills were to be used only for the purpose of facilitating removal from the demesne, it would seem fatuous to erect them on sites where the haulage through the demesne had practically terminated. But the defendant has contended strenuously, through his very able counsel, that he is entitled to use the sawmills for ulterior purposes; that his rights are not limited to the use of the mills merely for removal of timber from the demesne, but extend to its adaption, so far as a sawmill can adapt it, for the purposes of his business beyond the boundaries of the demesne. Thus by a series of gradations the licence to erect sawmills in the demesne is made to involve the extension from internal transit and removal from Oriel Temple to external transport to the depot at Antrim, and shaping on the plaintiff's lands of the trees when felled for the exigencies of the defendant's home traffic and foreign trade. In my opinion neither by express licence nor by any reasonable implication is such right vested in the defendant. He has, in my opinion, neither permission nor privilege to use the sawmills for manufacture; and the injunction granted by Mr. Justice Powell should be continued.

As to the avenues and farm roads, the agreement of 1st September allows "the period of five years for the removal of the timber and use of all roads and passes." This phraseology, in my opinion, connotes the existence of the roads during the period: that they shall be used, not abused; and continued, not annihilated. The agreement confers no exclusive rights of user on the licensee, and the rights of user by the

owner of the mansion-house and demesne for the reasonable and necessary purposes of his residence, farm, and lands are neither by express language nor necessary implication destroyed by the terms of this contract. As a matter of fact, however, they have been destroyed, and the learned Judge has found upon evidence which satisfied him, "that serious, continuous, and permanent injury has been done to the avenues and the roads, and damage not only to the surface of them, but to their foundation; and that, to use the expressive phrasing of one of the plaintiff's witnesses, 'some of them are burst up, and some of them are for all practical purposes destroyed.' " The defendant has rights regarding the user of the avenues and passes; so has the plaintiff. The user by the defendant must be reasonable, having regard to the capabilities of the roadways, and the fair requirements of the business of moving the felled timber over them. The learned Judge has used words which I respectfully adopt: "I am not going to decide as a matter of law in this case that the defendant is not entitled to use traction engines, motor lorries and caterpillars, and such like vehicles for the purpose of removing the timber over these avenues and farm roads. What I am deciding is that if he does use them, in so using them he is not entitled to destroy the plaintiff's avenues and farm roads, and to render them useless to the plaintiff for his legitimate purposes, or to reduce them to such a condition as to be dangerous to the plaintiff to use them for such purposes."

The injunctions granted by Mr. Justice Powell, with the consequential directions and inquiries, are, in my opinion, right; and the defendant's appeal should be dismissed.

Solicitor for the appellant: *J. Charley M'Dowell.*

Solicitor for the respondent: *M. J. O'Connor.*

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IN THE MATTER OF AN INDENTURE OF PARTNERSHIP DATED NOVEMBER 8TH, 1909, BETWEEN THOMAS POWER AND JOHN HENRY POWER. MARY MURPHY AND PATRICK CAREW, PLAINTIFFS; JOHN HENRY POWER, DEFENDANT (1).

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Partnership—Option to purchase—Expiration of term—Continuance of business without fresh article—Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 27, sub-s. 1—Death—Pre-emption clause—Inconsistent alternative—Application to partnership at will.

A and B entered into a partnership deed by which they agreed to carry on business for a period of ten years. One of the clauses in the deed provided that in the event of A predeceasing B during the term of ten years, B should be entitled to purchase the share or interest of A in the partnership assets, or if he should not so purchase same he should be entitled to have A's share of the partnership assets continued in the business for the remainder of the period of ten years; but the personal representatives of A or their assigns were not to be entitled to interfere with or take any part in the management of the business, but they were to be entitled to A's share of the partnership profits, and liable to bear his share of the losses as he would have done if he had lived.

After the expiration of the period of ten years in May, 1919, both parties continued to carry on the business as a partnership without entering into new articles and without making any fresh arrangement. On April 5th, 1921, A died, and the survivor B sought to purchase the share of the deceased partner in the assets.

Held (affirming O'Connor M.R.), that the whole clause read together applied only during the period of ten years, and was inapplicable to a partnership at will.

When alternative rights are given in an instrument, and one of these alternatives is obviously inapplicable to a partnership at will, the person cannot claim the benefit of the other alternative.

APPEAL from an order of the Master of the Rolls dated December 8th, 1922, whereby it was declared that clause 16 of the instrument mentioned in the title hereof applied only during the ten years therein stated, and did not apply in the events which had happened; and that on the death of Thomas Power on April 5th, 1921, John Henry Power was not entitled to purchase the share of the said Thomas Power upon the terms contained in the said instrument.

On November 8, 1909; Thos. Power and John Henry Power entered into a deed of partnership whereby they agreed to carry on as partners, under the name of Wm. Dwyer & Co., the business of wholesale grocers and retail wine and spirit merchants at Clonmel, County Tipperary. The duration of the partnership was limited to a period of ten years from June 1st, 1909. The terms of the deed provided that a salary of £200 per annum was to be paid to Thomas Power, but that no salary should be paid to John Henry Power. The net profits of the business were to be divided equally between the partners, and in like proportion they

(1) Before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

were to bear all losses, including loss of capital. Clause 16 was in the following terms:—

“In the event of the said John Henry Power predeceasing the said Thomas Power during the said period of ten years, his share or interest in the partnership assets shall, subject to its obligations, go to such person or persons as he shall by deed or will or codicil appoint. Such person or persons shall not be entitled to interfere with or take part in the management of the business, but shall be entitled to share in the profits and liable to share in the losses during the remainder of the said period of ten years in the same way as the said John Henry Power would have done if he had lived. If the said John Henry Power shall not appoint any such person or persons, then the said Thomas Power shall be entitled to purchase the share or interest of his deceased partner in the assets of the partnership business on the terms hereinafter mentioned. In the event of the said Thomas Power predeceasing the said John Henry Power during the said period of ten years, the said John Henry Power shall be entitled to purchase the share or interest of the said Thomas Power in the partnership assets on the terms hereinafter mentioned; or if he shall not so purchase same, he shall be entitled to have the said Thomas Power’s share of the partnership assets continued in the business for the remainder of the said period of ten years; but the personal representatives of the said Thomas Power or their assigns shall not be entitled in any way to interfere with or take any part in the management of the business, but they shall be entitled to the said Thomas Power’s share of the profits of the partnership, and shall be liable to bear his share of the losses in the same manner as he would have done if he had lived, provided, however, that the said John Henry Power shall not be entitled to exercise this option unless he shall within three months from the death of the said Thomas Power elect in writing to exercise it; failing such election the partnership shall at once determine.”

The terms of purchase provided that the purchase price should be the amount at which the share stood in the last balance sheet prepared prior to the death of the deceased. The purchase money was to be paid by ten equal instalments at intervals of six calendar months, together with interest on the amount for the time being remaining unpaid at the rate of 5 per cent. per annum.

The ten years came to an end on May 31st, 1919. Neither of the partners died during the period. The business was continued as a partnership without any fresh agreement or deed until April 5th, 1921, when Thomas Power died. By his will, dated March 21st, 1919, Thomas Power bequeathed two-thirds of his residuary estate to Mary Murphy and Patrick Carew, the plaintiffs. The testator did not specifically bequeath his share or interest in the business of William Dwyer & Co., but concerning the same directed as follows:—“It is my will that my executors shall have two years during which to realize my assets

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to the best advantage, having regard in this respect especially to my share or interest in the business of William Dwyer & Co., Clonmel." On May 28th, 1921, John Henry Power purported to elect in writing to exercise an option to purchase the share of the deceased in the business. Thereupon the plaintiffs issued a summons asking the Court to determine the following questions:—

1. Whether clause 16 of the said instrument enabling the survivor to purchase the share of the deceased partner applied only during the period of ten years therein mentioned, or whether same applied to a partnership at will continued after the expiration of the said period of ten years.

2. Whether on the death of Thomas Power on the 5th April, 1921, said John Henry Power was entitled to purchase the share of the said Thomas Power upon the terms mentioned in the said instrument.

3. If so, whether the said John Henry Power validly exercised the option to purchase the share of the said Thomas Power, deceased.

4. And for a declaration that the plaintiffs as residuary legatees under the will of said Thomas Power were entitled to have the said partnership wound up.

From the order of the Master of the Rolls declaring that upon the true construction of the deed of partnership and in the events which had happened, clause 16, enabling the survivor to purchase the share of the deceased partner, applied only during the period of ten years therein mentioned, and did not apply to a partnership at will continued after the expiration of the said period of ten years, the defendant appealed.

FitzGibbon K.C., Overend K.C. (with them *Marnan*), for the appellant:—

Section 27, sub-s. 1, of the Partnership Act, 1890 (53 & 54 Vict. c. 39), enacts that "where a partnership entered into for a fixed term is continued after the term has expired and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will." A pre-emption clause is not inconsistent with a partnership at will. *Cox v. Willoughby* (1), decided before the passing of the Partnership Act, laid down that the right of pre-emption applied to a partnership at will constituted by the carrying on of the business after the expiration of the stipulated period. In *Daw v. Herring* (2), decided after the Act had come into operation, it was held that the provisions of a clause in partnership articles giving an option to one of the partners to purchase the share of the other in the business were applicable to a partnership at will carried on by them after the expiration of the original term. [They referred also to *Brooks v. Brooks* (3).]

(1) 13 Ch. D. 863.

(2) [1892] 1 Ch. 284.

(3) 85 L. T. R. 453.

We admit that the provision in clause 16 empowering John Henry Power to retain Thomas Power's share of the assets in the business was applicable only during the period of ten years.

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Brown K.C. and *Murnaghan*, for the respondents :—

We admit that a pre-emption clause is applicable to a partnership at will, and that a clause providing for payment of the share of a deceased partner by instalments is applicable; but that is not this case. Clause 16 not only deals with pre-emption and provides for the payment of the purchase-money by instalments, but it renders the personal representatives of the deceased partner liable as partners for all time. Their capital might be retained in the business. The clause in its entirety was applicable only for the definite term of ten years.

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FitzGibbon K.C., in reply :—

These parties contemplated the capital of a deceased partner remaining in the business during ten years. If the true test be the substitution for ten years of a partnership at will, the right to retain the capital in the business does not cause any complication. Clause 16 is a severable clause.

MOLONY C.J. :—

On the 8th November, 1909, a deed of partnership was entered into between Thomas Power and John Henry Power, by which they agreed to carry on the business of wholesale grocers at Clonmel for a period of ten years from the 1st June, 1909. The partnership expired by effluxion of time on the 31st May, 1919; but both parties continued to carry on the business as theretofore until the death of Thomas Power on the 5th April, 1921. The surviving partner, John Henry Power, on the 28th May, 1921, elected to purchase the share of the said Thomas Power in the partnership assets on the terms mentioned in clause 16 of the partnership deed.

The plaintiffs are the executors and residuary legatees of the will of Thomas Power, deceased, and they have brought this summons in the Chancery Division against John Henry Power to determine the question whether clause 16 of the deed enabling the survivor to purchase the share of the deceased partner applied only during the ten years therein mentioned, or whether same applied to the partnership at will continued after the expiration of the said period of ten years.

The Master of the Rolls held that upon the true construction of the deed of partnership, and in the events which have happened, clause 16 applied only during the ten years therein mentioned, and did not apply to a partnership at will continued after the said period of ten years had expired.

Section 27, sub-s. 1, of the Partnership Act, 1890, enacts that where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agree-

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ment, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with the incidents of the partnership at will.

It is clear that Thomas Power and John Henry Power were partners at will from 31st May, 1919; and it has been held in several cases, both before and after the passing of the Partnership Act, that an option to purchase the share of a deceased partner is applicable to the partnership at will constituted by the carrying on of the business without fresh articles after the expiration of the partnership term: *Cox v. Willoughby* (1); *Daw v. Herring* (2); *Brooks v. Brooks* (3); and *M'Gown v. Henderson* (4).

The principle to be applied in determining a case such as this is well stated by Lord Selborne in *Neilson v. The Mossend Iron Co.* (5), where he was dealing with a state of facts similar to the present: "There is no doubt about the law that when there is a partnership for a term of years and it is afterwards, after the expiration of the term, continued at will, the rule, in the absence of contract to the contrary, is that it may be presumed that the new business is carried on upon the old terms so far as they are applicable to it, and only so far; and as far as the principle is concerned, I do not think there is any discrepancy between any of the authorities. It is not at all necessary to examine into the particular cases in which it has been held that a particular term of a written contract did or did not go into the new or unwritten contract, because every case has turned upon its own particular circumstances and upon the question as applied to the words of the particular instrument whether the old term was or was not applicable to the new contract."

We have now to examine the provisions of a deed, and in particular clause 16, and to determine whether the provisions contained in it are, in their essence, applicable or inapplicable to a tenancy at will. It is apparent from the deed that Thomas Power was to be the working partner, and accordingly clause 7 provides that he shall be paid a salary of £200 per annum, and that no salary shall be paid to the said John Henry Power; and clause 12 provides that while Thomas Power shall devote his whole time and attention to the business, John Henry Power shall not be required to attend to the business at all. The deed consequently, by clause 16, makes separate provisions for (a) the event of John Henry Power predeceasing Thomas Power during the period of ten years, and (b) the event of Thomas Power predeceasing John Henry Power during the same period. In the first event (which did not, in fact, happen) John Henry Power could appoint his interest in the partnership by deed or will to some person who was not to interfere in the management of the business, but was to be entitled to a share

(1) 13 Ch. D. 863.

(2) [1892] 1 Ch. 284.

(3) 85 L. T. R. 453.

(4) [1914] S. C. 839.

(5) 11 App. Cas. 298, at p. 303.

in the profits, and to be liable for the losses during the remainder of the period; but if he did not appoint such person, Thomas Power was to be entitled to purchase the share of John Henry Power in the partnership on the terms mentioned.

It has been held in *Cuffe v. Murtagh* (1) that a right to nominate a partner continued after the term of the partnership had expired. Chatterton V.-C. thus states the reason: "The disputed term here is not one the purchase of which can be accomplished in any other manner, nor is it inconsistent with any of the rights of the other partners if by tacit agreement they should continue the business after the expiration of the term of seven years. I can see nothing insensible or repugnant in such a clause if inserted in a deed establishing a partnership at will. It amounts to this and no more, that one partner may put a substitute for himself into the firm, who will have just the same rights as he would have had if he had continued a partner. If he was but a partner at will, so would his substitute be; if a partner for the residue of a term, so would his substitute be."

This provision is not, therefore, repugnant, nor is the further provision that if John Henry Power shall not appoint any such person, then Thomas Power shall be entitled to purchase the share or interest of the deceased partner.

The article then proceeds to deal with the event which has happened of Thomas Power predeceasing John Henry Power. In that event John Henry Power gets an option to purchase the share or interest of the said Thomas Power in the partnership, or, if he shall not so purchase same, to have the said Thomas Power's share of the partnership assets continued in the business for the remainder of the said period of ten years; but the personal representative of Thomas Power is not to be entitled to interfere with or take part in the management of the business, but shall be entitled to Thomas Power's share of the profits, and shall be liable to bear his share of the losses in the same manner as he would have done if he had lived. It is admitted by Mr. FitzGibbon, on behalf of the plaintiffs, that the right to compel Thomas Power's share of the partnership assets to be continued in the business at the option of John Henry Power was a provision applicable only during the period of ten years, and does not extend to a tenancy at will; but he claimed that he is entitled under the previous clause to now purchase Thomas Power's share, irrespective of the fact that the alternative provision cannot be given effect to.

The whole clause, however, must be read together, and so read it seems to me to apply only during the period of ten years.

The object of the clause, apparently, was to prevent the displacement of capital during that period, and had no reference to the possible extension of the partnership beyond that date. I can find no authority for the proposition that when alternative rights are given to a person, and one of these alternatives is

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(1) 7 L. R. Ir. 411.

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obviously inapplicable to a partnership at will, the person is entitled to claim the benefit of the other, when it was obviously the intention of the framers of the instrument that there should be two alternatives and the right to choose between them. I therefore consider that the Master of the Rolls was right, and that consequently the appeal should be dismissed.

RONAN, L.J.* :—

In this case we had a very powerful and elaborate argument from Mr. FitzGibbon, which appeared to me to require a fuller answer than was given to it by Mr. Brown. The law of partnership at present is partly regulated—and I say this advisedly—by the Partnership Act, 1890. It is remarkable that during the argument practically no reference was made to that statute. Mr. FitzGibbon relied, I think I may say, substantially upon two cases: *Cox v. Willoughby* (1); *Daw v. Herring* (2). The first was decided before the passing of the Act, and the other—*Daw v. Herring* (2)—was decided about a year after the Act had come into operation. I have read that case carefully, and from beginning to end there is no reference to the Act. Therefore I may take it that it was on the law as it was before the Act Mr. FitzGibbon relied; and in my judgment he was right in so doing. The Act was drawn by Sir Frederick Pollock, who, in the preface to his Digest on the Law of Partnership, 7th ed., says: “It will be observed that the Partnership Act does not purport to abrogate the case law on the subject; but, on the contrary, declares that ‘the rules of equity and common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act’ (sect. 46). The Act therefore has to be read and applied in the light of the decisions which have built up the existing rules. Should any practitioner imagine that he might now relegate Lord Lindley’s book to the shelf, he would be soon undeceived. Codes are not meant to dispense lawyers from being learned, but for the ease of the lay people and the greater usefulness of the law. The right kind of consolidating legislation is that which makes the law more accessible without altering its principles or its methods. So far as judicial references to the Act have gone, they tend to show that it has accomplished its object of declaring the law as it was settled and understood, without prejudging any remaining doubts on questions of principle, and without raising any new doubts on points of detail.” Those observations completely establish the correctness of the course taken by Mr. FitzGibbon of relying on the decisions before the Act; and may I say that I thought it better not to relegate Lord Lindley’s book to the shelf because on referring to it I find that it throws light on the subject. Text-books throw light on the law as understood by the profession, and the greatest

* This judgment has not been revised by Ronan L.J.

(1) 13 Ch. Div. 863.

(2) [1892] 1 Ch. 284.

weight ought to be given to the views of Lord Lindley. Practically speaking, his book on partnership is divided into three main parts, viz., 1, the nature of partnership and the rights and obligations of partners as regards non-partners; 2, the rights and obligations of the partners between themselves; 3, the dissolution of partnership and its consequences. The present case comes within the last of these categories; and by the common law and by the statute the effect of dissolution is to regulate the rights of the parties to the partnership assets, and, apart from special agreement to the contrary, they are regulated in a certain definite way.

In this case clause 16 of the deed is relied on as showing an agreement to the contrary. The party who alleges an agreement to the contrary is bound to prove it. In its literal construction clause 16 does not apply; but there is a principle that where parties do not dissolve the partnership at the time limited for its duration in the partnership agreement, then certain provisions in the agreement are supposed to continue. The provision we have to consider here is one in the nature of a right of pre-emption. Anxious to ascertain the existing law, the first book I consulted was Halsbury, vol. xxii, Art. 36, p. 23. There I find that if a partnership is continued beyond the stipulated period, it is governed, in the absence of agreement to the contrary, by the terms of the partnership as they were at the expiration of the period so far as they are applicable to a partnership at will; and among the clauses applicable a right of pre-emption is mentioned. In the next sentence it is stated that "provisions suitable to an agreement for a term of years are not so applicable, such as . . . rights of pre-emption." That article does not afford much assistance. The writer refers to *Cox v. Willoughby* (1) as an instance where it was held that the right of pre-emption applied to a partnership at will constituted by the carrying on of the business after the expiration of the partnership term. He also refers to *Yates v. Finn* (2), decided ten days earlier, where the contrary was held. What, then, is the test? In my opinion the test is to be found in the passage read by the Lord Chief Justice from the judgment of Lord Selborne in *Neilson v. Mossend Iron Co.* (3), where the question was whether a right of this nature was one of those which applied to a continuing partnership. [His Lordship read from pp. 303-4.] Now, that being so, I turn for a moment to Lord Lindley's book. Having referred to sect. 27 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), the book states, 8th ed., p. 473: "Even where a partnership is entered into for a term of years, and the articles provide for events happening during the term or during the partnership, the above rule has been still applied. Thus where two persons agreed to become partners for fourteen years, and stipulated that if either died during the said co-partnership term, his share should be taken by the other

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(1) 13 Ch. D. 863.

(2) 13 Ch. D. 839.

(3) 11 App. Cas. 298, at pp. 303-4.

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at a certain sum, and the fourteen years expired, and the two persons continued in partnership together without coming to any fresh agreement, and then one of them died; it was held that the above stipulation was binding, and that the share of the deceased belonged to the survivor upon payment of the sum mentioned." That is Lord Lindley's exposition of *Cox v. Willoughby* (1). In *Neilson's Case* (2) the words in the clause in question were: "If three months before the termination of this contract."

Let us see what are the terms of the partnership deed in this case. Clause 2 provides that the duration of the partnership shall be ten years from the 1st day of June, 1909. Clause 11 provides that "each partner may during the continuance of the partnership draw out of the partnership account at the bank" a certain monthly sum. These words would be within the rule laid down in Lindley. But what is the clause with which we have to deal? Clause 16 says: "In the event of the said John Henry Power predeceasing the said Thomas Power during the said period of ten years his share or interest in the partnership assets shall, subject to its obligations, go to such person or persons as he shall by deed or will or codicil appoint." There is no case in which the rule was held to apply where a clause such as that in question is expressly limited to years numbered. When the rule applies, it applies, as shown in Lindley, to events happening "during the term or during the partnership." But where words are used in one part of the clause in contradistinction to words in another part of the clause, none of the cases would appear to me to apply. In *Daw v. Herring* (3) the partnership expired by effluxion of time. Stirling J. laid down in that case on the terms used that the partnership might be terminated in two events, either when both parties were alive or when one of them was dead. On that ground alone I would be prepared to say that the case does not apply when there is a specific agreement providing for events happening during the term.

Here we start with the admission that the whole of clause 16 does not apply. What is the object of clause 16? It was to provide in the event of dissolution for certain events which would have been otherwise dealt with in the absence of special agreement. Rights were given to both partners. Thomas got certain rights if John Henry predeceased him, and John Henry got certain rights if Thomas predeceased him. The clause must be taken as a whole. It imposes conditions and liabilities upon both parties, and it cannot be split up, giving one party all the advantages. The ground of the decision in *Neilson's Case* (2) was that it appeared on the construction of the document that the period mentioned was the critical period.

The first part of clause 16 says: "In the event of the said John Henry Power predeceasing the said Thomas Power during the said period of ten years his share or interest in the partner-

(1) 13 Ch. D. 863.

(2) 11 App. Cas. 298.

(3) [1892] 1 Ch. 284.

ship assets shall, subject to its obligations, go to such person or persons as he shall by deed or will or codicil appoint. Such person or persons shall not be entitled to interfere with or take part in the management of the business, but shall be entitled to share in the profits and liable to share in the losses during the remainder of the said term of ten years in the same way as the said John Henry Power would have done if he had lived. If the said John Henry Power shall not appoint any such person or persons, then the said Thomas Power shall be entitled to purchase the share or interest of his deceased partner in the assets of the partnership business on the terms hereinafter mentioned." That event did not happen. The second part of the clause provides that "In the event of the said Thomas Power predeceasing the said John Henry Power during the said period of ten years, the said John Henry Power shall be entitled to purchase the share or interest of the said Thomas Power in the partnership assets on the terms hereinafter mentioned; or, if he shall not so purchase same, he shall be entitled to have the said Thomas Power's share of the partnership assets continued in the business for the remainder of the said period of ten years; but the personal representatives of the said Thomas Power or their assigns shall not be entitled in any way to interfere with or take part in the management of the business, but they shall be entitled to the said Thomas Power's share of the profits of the partnership, and shall be liable to bear his share of the losses in the same manner as he would have done if he had lived." Neither of the partners died within the ten years. The argument is, apart from the other grounds I have mentioned, that the expression "during the said period of ten years" shall have different meanings in different parts of this clause. In my opinion ten years must have the same meaning all through, and for these reasons I think the Master of the Rolls was right.

O'CONNOR L.J. :—

I concur; and for the reasons stated by the Lord Chief Justice here and the Master of the Rolls in the Court below.

Solicitors for the appellant : *D. & T. FitzGerald.*

Solicitors for the respondents : *Fullerton & Doyle.*

C. L.

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May 3, 12.

High Court
of Appeal.

July 27.
Oct. 31.

IN THE MATTER OF THE ESTATE OF ALLAN MILL, DECEASED,
BETWEEN T. R. C. HUGHES AND FREDERICK HENRY WATT,
PLAINTIFFS, AND MARY E. MCNAULL AND ALLAN MILL,
DEFENDANTS (1).

(1922. No. 45.)

Will—Gift of income for life and discretionary trust for application of corpus from time to time for benefit of legatee—No appropriation of corpus—Death of beneficiary—Intestacy.

Testator devised and bequeathed all his property real and personal to trustees upon trust for conversion, and after payment of his debts and funeral and testamentary expenses, and certain pecuniary legacies, upon trust to invest the proceeds, and to apply the income arising therefrom, and, if necessary, the corpus and capital thereof towards the support and maintenance of his cousin L. R. . L. R. died about three months after the testator, no payment or appropriation of any part of the corpus having been made to her by the trustees. The will did not contain any residuary clause.

Held, affirming the judgment of the Court of Appeal for Northern Ireland, that the entire corpus passed as on an intestacy to the next-of-kin of the testator.

SUMMONS for the determination of certain questions arising on the construction of the will of Allan Mill, deceased.

Allan Mill, who was possessed of certain landed properties, died on 22nd April, 1919, having made his will, dated 1st April, 1919. Probate of his will was granted on October 16th, 1919, to Rev. Thos. R. C. Hughes and Frederick H. Watt, the executors therein named. By his will testator devised and bequeathed to his trustees all his property, estate, and effects, real, freehold, and personal, of every nature, upon trust to sell, realize, and convert the same into money to the best advantage; and after paying thereout his just and lawful debts and funeral and testamentary expenses, to pay certain legacies, and subject thereto upon trust to invest the proceeds of the sale and conversion of the said property, estate, and effects upon sound trust securities, and apply the income arising therefrom, and, if necessary, the corpus and capital thereof, towards the support and maintenance of his cousin, Mrs. Lilian M. Reid, who had been residing with him for some time; and he declared that his trustees should have absolute discretion in the application of not only the income, but also the corpus and capital of the said trust estate so left in trust for the benefit of his said cousin, Mrs. Reid, his desire being that the same should be used with the utmost discretion, so that the said Mrs. Reid should, if possible, have a maintenance during her life, or so long as possible thereout.

The testator did not make any bequest of his residuary estate, and appears to have assumed that the whole would be required for Mrs. Reid's benefit.

After the death of the said Allan Mill, deceased, Mrs. Lilian

(1) Before SIR JOHN ROSS, Bart., C., MOLONY C.J., and MOORE L.J.

M. Reid continued to live in his house, and was supported out of the income arising from the assets of the deceased up to the date of her death.

The said Mrs. Lilian M. Reid died on the 22nd July, 1919, having on the 11th July, 1919, made her last will, whereby she bequeathed and devised all her property, real and personal, to her sisters, Margaret Ann McNaull, Mary Emmeline McNaull, and Frances Jeanette McNaull; and appointed the above-named Mary Emmeline McNaull sole executrix thereof.

The deceased, Allan Mill, left him surviving two uncles, William H. McNaull, the defendant, Allan Mill, and an aunt, Lydia Doherty.

The income arising from the assets of the said testator from the date of his death to the date of the death of the said Lilian M. Reid was more than sufficient to pay for her support and maintenance; and, after making the said payments, there remained of the said income for the said period a sum of £511 17s. 9d. There also remained after payment of all funeral and testamentary expenses, debts, and the pecuniary and specific legacies, a residue of £3,430 12s. 8d.

The defendant, Mary Emmeline McNaull, claimed that as executrix of the said Mrs. Lilian M. Reid she was now entitled to the entire property of Allan Mill, deceased. The defendant, Allan Mill, claimed that the deceased Allan Mill died intestate with regard to the residue of his estate, and that he as one of the next-of-kin was entitled to his distributive share.

A summons was taken out by the plaintiffs and executors to have the following questions determined:—

1. Is there an intestacy under the said will as to the residue of the estate of the said testator?

2. If not, is the said Mary Emmeline McNaull, as executrix of the said Lilian M. Reid, entitled to the said residue?

3. Does the unexpended portion of the income of the said estate which accrued during the lifetime of the said Lilian M. Reid form part of the said residue?

4. If not, is the said Mary Emmeline McNaull, as executrix of the said Lilian M. Reid, entitled to the said unexpended portion of the said income?

The matter came before Wilson J., who held that, as to 1, the said Allan Mill did not die intestate as to the residue of his estate; that, as to 2, the defendant, Mary Emmeline McNaull, as executrix of Lilian M. Reid, deceased, a legatee named in the will of the said Allan Mill, was entitled as such executrix of the said Lilian M. Reid to such residue; that, as to 3, the unexpended portion of the income of the estate of the said Allan Mill, deceased, which accrued during the lifetime of the said Lilian M. Reid, deceased, formed part of the residue of the estate of the said Allan Mill, deceased; that, as to 4, the defendant, the said Mary Emmeline McNaull, as such executrix of the said Lilian M. Reid, was entitled to the unexpended portion of such income.

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The defendant, Allan Mill, appealed to the Court of Appeal in Northern Ireland.

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Price K.C. and *Shannon*, for the defendant, Mary Emmeline McNaul.

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M'Gonigal K.C., *Babington K.C.*, and *Dougherty*, for the defendant, Allan Mill.

—
May 12.

ANDREWS L.J. delivered the judgment of the Court. (1) as follows:—

The general principles which apply to the construction of such wills as that of the testator, Allan Mill, are well settled, and may be easily stated, though much difficulty is frequently experienced in their application to the construction of particular wills, owing to the ever-varying language employed by testators in their endeavours, which frequently prove ineffectual, to express their real intention.

It would be difficult to find a more concise or accurate statement of the law than that enunciated by Lord Davey in *Hancock v. Watson* (2). "It is," he says, "settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of-kin as the case may be." He points out, as did Lord Cottenham in *Lassence v. Tierney* (3), that if the terms of the gift are ambiguous as regards its absolute or limited character, assistance may be sought in construing it from the other parts of the will, including the language of the engrafted trusts. But if the Court is once satisfied that the first gift is in terms absolute, and if the fund in question is the whole or a definite share of residue, the next-of-kin are excluded from participation therein. Thus, in *Hancock v. Watson* (2), to which we have referred, the House of Lords held that, as there was an original absolute gift to a beneficiary, and as the gift-over on her death was invalid, the original gift remained, and the property passed upon her death to her representatives. *Scawin v. Watson* (4) and *Lassence v. Tierney* (3) are, on the other hand, examples of cases in which the absolute nature of the gift was not established, and in which accordingly the beneficiary's interest was held to terminate with his death. In every case the question is purely one as to the true construction of the language employed by the testator.

The authorities establish clearly, as it appears to us, another principle closely akin to that to which we have referred. If the whole of a definite fund or of the income thereof is given for the maintenance of a named beneficiary, and discretionary powers or

(1) SIR DENIS HENRY, Bart., C.J.,
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(2) [1902] A.C. 14, at p. 22.

(3) 1 Mac. & G. 551.

(4) 10 Beav. 200.

trusts are conferred upon trustees in reference to its application, the powers or trusts are invalid as being repugnant to the character of the prior absolute gift, and such beneficiary is held absolutely entitled to the fund or income, as the case may be. Accordingly, if he dies before it has been paid or expended, his personal representatives are entitled to it. But if, on the other hand, the discretionary powers or trusts do not extend to the whole fund, but only to such part thereof as the trustees think fit, the beneficiary is not entitled to the whole fund unless it is in fact required for the specified purpose of the beneficiary's maintenance. *Cope v. Wilmot* (1), *Gough v. Bult* (2), and *Gude v. Worthington* (3) are sometimes cited as authorities for the proposition that even in this latter case the beneficiary would be absolutely entitled to the whole fund; but we share with the editors of *Jarman on Wills*, 6th ed., at p. 886, very grave doubts as to whether any of these cases can now be regarded as binding authorities.

The same principles will be found to be most accurately and concisely expressed in the judgment of Wood V.-C. in *Sanderson's Trusts* (4). "In reference to gifts of this description," he says, "there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given and a special purpose be assigned for that gift, the Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be. Thus, where there is the gift of a sum to apprentice a child or to buy a commission for a son, the Court gives effect to the entire gift; and whether the sum can or cannot be applied for the purpose of buying the commission or apprenticing the child, the Court holds that the child is entitled to the whole of it. So again with regard to maintenance, as to which the distinction between the two classes of cases is very clearly put by Sir William Grant in *Hanson v. Graham* (5), where he says that if an entire fund is given for the maintenance of children or the like, they take the whole fund absolutely, and the maintenance is treated in effect as simply the motive in making the gift; while, on the other hand, if a portion only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose specified."

This case was followed by *In re Stanger and Moorsom v. Tate* (6). In that case the testator gave a share of residue after the determination of a life tenancy therein to trustees upon trust to "pay or apply all or any portion of the income or corpus of the same in or towards the support or maintenance or

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(1) [1771] 1 Coll. 396n.

(2) 16 Sim. 45.

(3) 3 De G. & S. 389.

(4) 3 K. & J., at p. 503.

(5) 6 Ves. 239.

(6) 60 L. J. Ch. 326.

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otherwise for the benefit of their brother R. in such manner and proportions in every respect and at such times as they shall deem most conducive to his welfare." The brother predeceased the tenant for life; and it was held that the effect of the gift was to empower the trustees to apply so much of the share as might be required for the personal benefit of their brother, but that no trust was to be implied in his favour as to the whole of the share, and consequently that the share did not pass to his legal personal representative. In his judgment Chitty J. says that it is material to observe that the discretionary power was not so framed as to make it the duty of the trustees to apply the whole of the income or corpus for R. Tate's benefit. Had this been so, he says he would have been prepared to hold that he took a vested interest in the whole fund. The term "benefit" used by the testator was, he considered, qualified by the whole terms of the trust, which were sufficient to show that the whole fund was not intended to pass for the benefit of R. Tate unless the trustees thought fit in the exercise of their discretion so to apply it.

The still more recent case of *In re Johnston, Mills v. Johnston* (1), must also be carefully noted, as the distinction between the two classes of cases referred to is very clearly brought out both in the arguments and also in the judgment of Stirling J. A testator gave to trustees all his property upon certain trusts, and directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be applied as the trustees in their discretion might think fit; and he further directed that the sums specified should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients. It was held that the sons were absolutely entitled to the legacies freed from the exercise of any discretion on the part of the trustees, as the discretion sought to be conferred upon the trustees was really an attempt to fetter the enjoyment by a person of a benefit to which he became absolutely entitled under the will. Stirling J., however, points out very clearly in his judgment that the testator might (if he had been well advised) have effectually accomplished the object he had in view had he made the gift entirely dependent on the discretion of the trustee. "For example," he says, "he might have given to the legatees such sums only as the trustee in the absolute exercise of his discretion thought ought to be given to them."

In other words, where the testator has directed an absolute appropriation out of his estate of a particular sum for the benefit of a legatee, his gift will not be displaced or interfered with by the imposition of a discretion to be exercised by a trustee; but if, on the other hand, the discretion is vested in a trustee to apply the whole or such part of a fund as he thinks fit for the benefit of a legatee, the discretionary power is a perfectly good one, and the legatee will only be entitled to such part of the

(1) [1894] 3 Ch. 204.

fund as the trustee may determine. *Pedrotti's Will* (1), which was cited to us by Mr. McGonigal, was decided in accordance with the principles which we have enunciated.

The general scheme of the will of Allan Mill is not difficult to follow, and the main object which he had in view is equally clear. He devised and bequeathed all his property to his trustees on trust for conversion, and after payment of debts and legacies for investment by them on sound trust securities. He next directed them to apply the income arising therefrom, and, if necessary, the corpus and capital thereof, towards the support and maintenance of his cousin, Mrs. Lilian M. Reid, who, he states, had been residing with him for some time.

Now, as these are the words of gift, it is proper to pause for a moment to consider their effect. In them, it appears to us, that the testator clearly manifests a twofold desire:—

(a) That his first consideration was the maintenance of Mrs. Reid. She had been maintained by him when residing with him, and it was his wish that she should not be deprived of such maintenance by his death.

(b) That his trustees should retain dominion over his property; that they should apply the income, and, if they thought it necessary, the corpus for the purpose stated, namely, the maintenance of Mrs. Reid.

How can it be said that there is to be found in the words referred to an absolute appropriation of the whole or any specified part of the corpus of the residue? There is no original absolute gift of corpus; the trustees' discretion dominates and controls the entire gift. If and when they determine that the application of any particular part of the corpus is necessary for the purpose of the maintenance of the beneficiary, Mrs. Reid, or if they fail to exercise their discretion bona fide and such necessity in fact exists, she becomes entitled to same; but not till then. This discretion on the part of the trustees is clearly brought out in the proviso which immediately follows, the only inconsistency being that the proviso seeks (ineffectually, as it appears to us) to extend the trustees' discretion to the income as well as to the corpus. Then follows what may be called the testator's interpretation clause: "My desire being that same shall be used with the utmost discretion, so that said Lilian M. Reid shall, if possible, have a maintenance during her life or as long as possible thereout, and that same may not be squandered or extravagantly used, lest she should become unprovided for or in want." Here again we see the dominating motives which influenced the mind of the testator. Every other consideration is to be subsidiary to Mrs. Reid's maintenance. The fund was to be administered in such a way as, if possible, to provide her with a maintenance during her entire life. Anticipating that she would survive him for many years, his only apprehension was that if the capital were too freely encroached upon, the entire fund might disappear before her death, and she might be

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left destitute. He thought it probable that encroachments would have to be made in the corpus yearly. If Mrs. Reid had full control over the fund, it might be extravagantly or injudiciously used. She must be protected from herself, so that if possible she would be provided for as long as she lived.

But that is all. We have searched the will from beginning to end, and have utterly failed to find in it any expression of a desire by the testator that if any part of the corpus remained at her death it should fall into and form part of her estate, for in truth the testator never appears to have contemplated the possibility of there being any residue, and it is therefore impossible to impute to him any intention as to its disposition.

Reading the will in the way we have done, subject to the one small point to which we have referred, we have a perfectly consistent will, full effect being given to every part of it, and no portion being rejected on grounds of repugnancy. We freely admit that if, on its true construction, the first clause had amounted in terms to an absolute gift of the corpus of residue, the testator's object and desire in endeavouring to place the fund under the control of the trustees would necessarily have been defeated, and there would have been no answer to a claim for payment by Mrs. Reid during her lifetime or by her personal representatives since her death. But as, on the contrary, we find no such absolute gift in any part of the will, we are able to give it, whether taken clause by clause or as one entire document, a construction which is, in our opinion, clearly consonant with the wishes of the testator.

We have been referred by Mr. Price to the line of authorities which clearly establishes that a gift of the income of property to a person without limitation as to time is a gift of the capital where no other disposition of the capital is made; but we are of opinion that this principle has no application to the present case, as not only is the capital expressly referred to in the very same clause of the will as disposes of the income, but we also consider that, as the purpose of the gift was for the maintenance of Mrs. Reid during her lifetime, it is impossible to say that the gift of income was made without limitation as to time.

Accordingly we hold that, as no portion of the corpus was ever appropriated by the trustees to Mrs. Reid for her maintenance during her lifetime, the entire corpus now passes as on an intestacy to the next-of-kin of the testator.

The defendant, Mary Emmeline McNaul, appealed to the High Court of Appeal for Ireland (1).

Price K.C. and *Shannon*, for the defendant and appellant, Mary Emmeline McNaul.

M'Gonigal K.C., *Babington K.C.*, and *Dougherty*, for the defendant, Allan Mill.

(1) In the High Court of Appeal for Ireland, before SIR JOHN ROSS C., MOLONY C.J., and MOORE L.J.

SIR JOHN ROSS, Bart., C.* :—

There is no conflict as to the principles of law to be applied in the construction of the will before us.

It is stated that if there is an absolute gift to a legatee in the first instance, and trusts are engrafted on that absolute interest which fail, the absolute gift takes effect to the exclusion of the residuary legatee or next-of-kin: *Hancock v. Watson* (1). If there is any ambiguity about the terms by which the gift is conferred, the Court is entitled to consider the other parts of the will, including the words used by the testator in framing the engrafted trusts: *Lassence v. Tierney* (2). We have then to consider whether in this will there is an absolute gift of the income and the corpus.

After payment of debts and legacies, the trust is to apply the income, and, if necessary, the corpus and capital, towards the support and maintenance of Mrs. Reid. An uncontrolled discretion is given to the trustees in the application of not only the income, but the corpus, for the benefit of Mrs. Reid. The testator then expresses his desire that Mrs. Reid should, if possible, have a maintenance for her life or as long as possible thereout, and that the same may not be squandered or extravagantly used, lest she should become unprovided for or in want.

Having regard to the circumstances of this case and to the language used in the will, we are in a position, as it were, to occupy the testator's chair and to understand what was in his mind when he made his will. Mrs. Reid had been residing with him for some time. She was a comparatively young woman. The property he had to dispose of amounted to about £3,400. He naturally expected her to survive him for a considerable number of years. His great fear was that there might not be enough to maintain her as long as she lived. He was doubtful about the sufficiency of the provision, and he therefore enjoined on his trustees the exercise of the utmost care and discretion in the application of the fund, so that if possible it might last during her life. This seems to have been his only anxiety; he never contemplates the possibility of there being any surplus over after Mrs. Reid's requirements were supplied. He gives no direction for the distribution of any possible surplus. When he speaks of a maintenance during her life or as long as possible, he is not to be taken as imposing any limit or restriction whatever.

Now, what happened was that he died himself on 22nd April, 1919, and Mrs. Reid, who was only 51 years of age, survived him only for three months, as she died on the 22nd of the following July. None of the capital had been used, and not very much of the income. There is no dispute as to the disposition of

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* The judgments of SIR JOHN ROSS C. and of MOLONY C.J. were read by
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(1) [1902] A. C. 14.

(2) 1 Mac. & G. 551.

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the balance of the income; it goes to Mrs. Reid's representatives. But as to the capital, how do matters stand? There is no gift of the capital in the first instance. It is only to be resorted to if necessary. Who is to decide whether it is necessary to resort to it? The trustees; not the legatee. They have an absolute discretion in the application of the income and capital so left. The words "so left" mean subject to the discretion of the trustees as aforesaid.

The conclusion of the whole matter is that the testator thought he had disposed of the entire fund in providing for Mrs. Reid; but in consequence of her early death the entire capital was undisposed of, and must go to the next-of-kin, as on an intestacy.

The appeal must therefore be dismissed; and, as agreed, both parties will get their costs out of the corpus.

MOLONY C.J. :—

The testator gave all his property to trustees upon trust to sell, and, after paying some small pecuniary legacies, to invest the proceeds of the sale, and to apply the income and, if necessary, the corpus and capital thereof towards the support and maintenance of his cousin, Mrs. Lilian M. Reid.

The words taken by themselves mean that the beneficiary got an absolute right to the income, but was not to receive any part of the corpus or capital unless it was necessary for her support and maintenance. The question would then arise as to who was to judge of the necessity; and the testator adds the proviso, which makes this point perfectly clear. The words are: "Provided always, and I hereby declare it to be my will that my trustees or the trustee for the time being of this my will shall have an absolute discretion in the application of not only the income, but also the corpus and capital of the said trust estate and funds so left in trust for the benefit of my said cousin, Mrs. Lilian M. Reid, my desire being that same shall be used with the utmost discretion, so that the said Lilian M. Reid shall, if possible, have a maintenance during her life or so long as possible thereout, and that same may not be squandered or extravagantly used, lest she should become unprovided for or in want." This proviso shows that the testator meant to leave everything in the discretion of his trustees. So far as the income was concerned, it could not in law cut down the effect of the previous absolute gift of the income; but as regards the corpus, of which there was no previous absolute gift, there was nothing to interfere with the discretion of the trustees in the application of the corpus. The testator was clearly apprehensive that the income from the investments would not be sufficient to maintain his cousin, and therefore gave the testators power to apply the corpus for that purpose. He not unreasonably thought that she might survive him for many years, and he did not at all contemplate the event which happened of her death shortly after himself without it being necessary to apply for her

benefit any part of the corpus. He made no disposition of the corpus in the event which has happened, and consequently I agree with the judgment of the Court below that as no portion of the corpus was ever appropriated by the trustees to Mrs. Reid for her maintenance during her lifetime, the entire corpus now passes as on an intestacy to the next-of-kin of the testator.

I do not think it necessary to examine the cases which have been cited to us, for the same reason as was stated by Lindley L.J. in the case of *In re Stone, Baker v. Stone* (1), where he said: "I do not enter into an examination of the cases; when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases."

MOORE L.J. :—

As I agree with every word of the careful judgment of my brother Andrews L.J. in the Court below, it is not necessary that I should add much. Mr. Price has urged on us that we must have regard to the scheme of the whole will. I assent to this proposition. In my opinion the paramount wish of the testator was to provide for Mrs. Reid during her life, eking out income, and if necessary resorting to corpus for that purpose. The contingency that she might die long before the income or corpus was exhausted never seems to have occurred to him. On the contrary, he expresses the fear that by extravagant expenditure of it during her life it might be so squandered that she might become unprovided for or in want, and this he specially endeavoured to guard against. There was no way in which this could be done if he made an absolute gift of the money. She was a woman; she might with advancing years have less control over her affairs; and in such a situation I am satisfied that to secure an adequate maintenance for her he was anxious to protect her against herself. I think he carried out this intention by fettering the expenditure of both income and corpus, with the discretion of the trustees named. It was in them an absolute discretion. It was not the wish of Mrs. Reid, but the judgment of the trustees as to her necessity that was to control the application of the income and corpus. Having regard to the authorities cited, I am of opinion that the trustees took the trust estate impressed with a trust for the benefit of Mrs. Reid in her lifetime, but to be resorted to only so far as the trustees in their absolute discretion thought expedient. This does not amount to an absolute gift to her; and in my opinion on her death the next-of-kin of the testator became entitled to the corpus as undisposed of residuary estate, and the appeal consequently fails.

Solicitors for the executors: *Crookshank, Leech, & Davies.*

Solicitor for the defendant, Mary Emmeline McNaull: *R. W. M'Veice.*

Solicitors for the defendant, Allan Mill: *Macaulay, O'Neill, and Martin.*

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J. M'C.

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March 13.

BLAKE v. BLAKE AND ANOTHER.

IN THE MATTER OF KATHERINE NEWPORT WHITE, DECEASED.
HARRIETTE BLAKE, PLAINTIFF, AND EILEEN BLAKE AND
REV. B. NEWPORT WHITE, DEFENDANTS.

(1923. No. 185.)

*Will—Construction—Bequest of shares—After-acquired shares—General gift—
“Falsa demonstratio”—Wills Act (1 Vict. c. 26), s. 24.*

A testatrix bequeathed to her niece E. B. “all the shares in any company I have that are absolutely my own,” and specifically named certain shares, but was possessed of others which she did not name. She subsequently became entitled absolutely as survivor to other shares which had stood in the joint names of herself and her sister, on the death of the latter.

Held, 1, that the enumeration of certain shares in the will did not cut down the previous bequest; 2, that E. B. under said bequest was entitled only to the shares testatrix was possessed of at the date of the execution of the will.

ORIGINATING SUMMONS brought by Harriette Blake, administratrix of the will of Katherine Newport White, for the determination of certain questions arising upon the construction of the said will, dated the 3rd day of December, 1913, the terms of which were as follows:—“I leave to my niece, Eileen Blake, all the shares in any company I have that are absolutely my own; fourteen shares in Coats ordinary; two shares, Irish Civil Service; eight shares in Arnott’s, four ordinary and four preference; also the money I have on deposit in the Irish Civil Service; they are in the little mahogany box in my drawer in the chest of drawers in my room; also my pearl ring, which I think she had a fancy for; and I leave my sister, Margaret Newport White, my executor and residuary legatee.”

At the date when the said will was made, Katherine Newport White and her sister, Margaret Newport White, were living together, and each of them had investments in her own name, and there were also investments in their joint names. Margaret predeceased Katherine, and died on February 28th, 1919; and on June 24th, 1919, Katherine was declared to be a person of unsound mind, and by order dated November 3rd, 1919, a committee was appointed. By the said order it was found that certain investments formed part of the property of the said Katherine, and that they stood in her sole name. It was found by the said order also, and by order dated May 10th, 1920, that certain therein recited investments were standing in the joint names of Katherine and Margaret, and that Katherine was entitled thereto as survivor. Katherine died on June 29th, 1922, and on November 13th, 1922, letters of administration, with the

will annexed, of the personal estate of Katherine were granted to the said Harriette Blake. Katherine left her surviving the said Harriette Blake, her sister, and the defendant, Rev. Benjamin Newport White, her brother, her sole next-of-kin. On November 17th, 1922, the said matter was duly dismissed out of Lunacy, and the investments transferred into the name of the Accountant-General.

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The questions submitted to the Court were:—

1. Whether upon the true construction of the said will the bequest therein contained to the defendant, Eileen Blake, of “all the shares in any company I have that are absolutely my own; fourteen shares in Coats ordinary; two shares, Irish Civil Service; eight shares in Arnott’s, four ordinary and four preference; also the money I have on deposit in the Irish Civil Service,” operated as a bequest to the said Eileen Blake of any shares other than those specifically mentioned.

2. If the first question be answered in the affirmative, whether the said bequest operated as a bequest of (a) shares which at the date of said will stood in the joint names of the testatrix and her sister, Margaret Newport White, and which were at the time of the death of the testatrix absolutely her own; and (b) shares which were acquired by the said testatrix after the date of the said will, other than those included in (a), and which were at the time of the death of the testatrix absolutely her own.

Chadwick, for the plaintiff.

Phelps, for Eileen Blake.

Newett, for Newport B. White.

O’CONNOR M.R.:—

I have no doubt as to the construction of this will. The question is whether the words carried all the shares the lady had in any company and which were absolutely her own, or whether the bequest was confined to the shares which she specifically described. In the first place, we have a perfect description of what she wanted to bequeath in the words, “all the shares in any company.” I cannot conceive any words more free from doubt than these are. She gives all her shares in every company, no matter what it is, to her niece. No doubt that is followed by an enumeration of certain shares; and the lady may have possibly intended for the convenience of her executors to indicate what these were, and she jotted down “fourteen shares in Coats ordinary,” &c. It is plain that is an imperfect enumeration, as she had ten shares, and not eight shares, in Arnott’s. I think that this old lady was jotting down sentences in her will as she went on; and having first given her niece all the shares she possessed, she proceeded as well as she could to enumerate them. That was an imperfect enumeration. She

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says they are in the little mahogany box. If all the shares in any company she had were in the box, it would go strongly in support of the wider construction which it is contended should be given to the words, "shares in any company." I go on this broad principle: we have a clear description, in the first place, of what she wanted to dispose of in the words, "all the shares in any company"; and I think before that is cut down there must be a clear intention shown that it should be cut down. I cannot find that clear intention in the imperfect description—the *falsa demonstratio*—that follows. Therefore I hold that this lady, Eileen Blake, is entitled to all the shares in any company which the testatrix held and which were absolutely her own.

Now, the further question arises: how are we to ascertain the shares that were absolutely her own; is it as of the date of the will or the date of the death of the testatrix? No doubt under the Wills Act every will must speak as of the date of the death of the testator; and if we construe the words, "absolutely my own," as if written at the date of the death, they would cover the shares which at the date of the will were standing in the name of the testatrix and her sister, and were afterwards her own. On the other hand, if these words are to be construed as of the date of the will, the description must be restricted to the shares which then stood in her own sole name. I think there is ample evidence to show that the testator intended that that description, "absolutely my own," should apply to the state of affairs as existing on the 3rd December, 1913. She says, "all the shares in any company I have that are absolutely my own"—that is, that were then absolutely her own. These words alone might not be sufficient evidence of a contrary intention under sect. 24 of the Wills Act; but the further words, "they are in the little box," &c., show clearly that the will should speak as of the date of its execution by the testatrix, and not as of that of her death. I must hold, therefore, that she died intestate as to the shares in the joint names of herself and her sister.

Solicitors for all parties: *Stanuell & Son.*

R. R.

THE ATTORNEY-GENERAL (AT THE RELATION OF THE) COUNTY
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COMPANY.

(1922. No. 194.)

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Feb. 20.

Bridge—Increased burden of traffic—Statutory duty to keep bridge in good and substantial and serviceable repair, and in an efficient state—Standard of repair—27 Geo. 2, c. iii, sects. 1 to 8; 19 & 20 Geo. 3, c. xxxii (Ir.), sect. 1; 54 Geo. 3, c. cxxxii, sects. 2 and 6; 6 & 7 Vict. c. civ (Local), sects. 21, 24, 62, 63, 64, 65, 66, 67, 144, 159; 36 Vict. c. lxxv, sect. 2—Ulster Canal and Tyrone Navigation Act, 1888 (51 & 52 Vict. c. cxxxvii), sect. 8.

A private Act of 27 Geo. 2, c. iii, empowered a corporation to make a canal; under subsequent Acts large sums of money were subscribed by different persons for the purpose of carrying on and improving the navigation of the said canal; and by Act of Parliament, 54 Geo. 3, c. cxxxii (Local), all such persons were incorporated in a company of undertakers, and all the property of the said canal was vested in the said company of undertakers. By further Act of Parliament, 6 & 7 Vict. c. civ (Local), all the property, rights, and liabilities of the said company of undertakers were transferred to and vested in the defendants. By sect. 62 of 6 & 7 Vict. c. civ, it was provided that the company should "maintain and keep all bridges, roads," etc., belonging to the canal, and "all works to be thereafter executed for the improvement thereof in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof, and of the traffic on the same respectively."

The canal was duly completed, and the company made bridges over the canal in accordance with the Acts of Parliament.

It was admitted that a bridge erected under the said Acts prior to the year 1835 had for several years prior to the year 1919 not been adequate to carry the ordinary traffic in the district as increased and varied in character particularly as to motor traffic.

In an action by the Attorney-General, at the relation of the County Council, against the company for a declaration that they were liable to keep the bridge in good and substantial and serviceable repair, and in an efficient state, so that it might be sufficient to bear the present-day ordinary traffic of the district which might reasonably be expected to pass over it:

Held, reversing the judgment of Wilson J., that the company were only liable to keep the said bridge in such good and substantial repair as sufficed for the traffic thereon in the year 1843.

APPEAL from the judgment of Wilson J.

By an Act of 27 Geo. 2, c. iii, the "Corporation for Promoting and Carrying on Inland Navigation in Ireland," the predecessors in title of the defendants, were authorized to open a passage of water between Lough Neagh and Belfast, portion of which, from Belfast to beyond Spencer's Bridge, was made on the line of the River Lagan, and the remaining part of which was made by a canal cut from the River Lagan to Lough Neagh. The Act continued in force for eleven years, and by further Acts the term of eleven years was extended from time to time as each term respectively expired; and by an Act of 19 & 20 Geo. 3, c. xxxii (Ir.), sect. 1, the Corporation or its successors were further "empowered to open all rivers, and to make all

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such outlets, off-branches, cuts, navigations, trenches, passages, aqueducts, bridges, dams, and weirs as may by such company be judged necessary for carrying on the said works."

By further statute of 54 Geo. 3, c. ccxxxi, sect. 2, the undertakers were authorized "in such places as the company shall think fit to make deeper and wider as well the bed of the said River Lagan as the present canal of the said navigation, and also to repair, maintain, amend, and uphold all such works and other things as have already been erected, made, or done under or by virtue of the recited Acts or any of them, and also to make, erect, . . . and perform all such works, matters, and things as shall be requisite and convenient for making, completing, and maintaining the several canals by this Act authorized, and the navigation . . . and the several powers, authorities, provisions, so far as same are now in force respectively, and so far as the nature and circumstances of the case will admit, shall be used and exercised by the said company . . . and applied, enforced, and put in execution for making, completing, preserving, and maintaining the said several canals, improvements, and works by this Act authorized . . . in like manner as if works authorized by previous Acts had been authorized as part of the works."

By sect. 62 of the Act 6 & 7 Vict. c. civ (Local), it was further provided that "the company shall at all times during the continuance of the said Act (i.e., for thirty-one years; see sect. 223) maintain and keep . . . all works, bridges . . . retaining and other walls, fences, and embankments upon or connected with all county or other roads made and constructed by the said company . . . in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof, and of the traffic on the same respectively." This Act was continued in force by virtue of sect. 2 of 36 Vict. c. lxxv, for a further period of thirty-one years; and by sect. 8 of the Ulster Canal and Tyrone Navigation Act, 1888 (51 & 52 Vict. c. cxxxvii), the Lagan Canal was transferred to the Lagan Navigation Company, the present defendants; and the Act was continued in force for a further period of 999 years.

The Lady Bridge, the subject of the present action, was constructed at some period previous to 25th December, 1835, when the powers conferred and continued by the previous Acts temporarily ceased to exist.

In 1920 the Attorney-General, at the relation of the County Council of the County of Down, commenced the present action against the defendants, claiming, 1, a declaration that the defendants were liable to maintain a certain bridge in the claim specified, and the retaining walls thereof, and to keep the same in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof and of the traffic thereon; 2, a declaration that the defendants were liable to pay and make good to the plaintiffs, the County Council of the County of Down, all monies paid and expenses incurred by

reason of the failure of the appellants to keep the said bridge and walls in such good, substantial, and serviceable repair; 3, a declaration that the defendants were liable to maintain and keep in repair the said bridge and walls sufficient to bear the traffic of the district which might reasonably be expected to pass along and over the said bridge; 4, payment by the defendants of all monies expended by reason or on account of the neglect or failure of the defendants to keep the said bridge and walls in such repair as aforesaid.

The defendants by their defence alleged that they were not bound to maintain and keep the said bridge in such repair and condition as may be sufficient and necessary to bear the ordinary traffic of the district and the traffic which may reasonably be expected to pass along and over the said bridge, but only to maintain and keep the said bridge in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof, and of the traffic on the same respectively, for the purposes and within the meaning of sect. 62 of the Act 6 & 7 Vict. c. civ.

At the trial it was admitted, 1, that the bridge in question and the retaining and other walls connected therewith were constructed prior to the passing of the Act 6 & 7 Vict. c. civ (Local); 2, that the said bridge and also all retaining and other walls were at the date of their construction and at the date of the passing of said Act adequate to carry the ordinary traffic of the district served thereby; 3, that the ordinary traffic of said district had since the construction of said bridge and since the date of passing of said Act increased in amount and varied in character, particularly as to motor traffic; 4, that the said bridge and also the retaining and other walls connected therewith had been since their construction maintained in a good and sufficient state of repair adequate to carry the traffic of the said district as existing at the date of passing of the said Act; 5, that the said bridge and also the retaining and other walls connected therewith had for several years prior to the year 1919 not been adequate to carry the ordinary traffic carried over the county roads in the said district as increased and varied in character, particularly as to motor traffic, since the date of said Act; 6, that in the year 1919 portion of one of the retaining walls of the said bridge collapsed, and such collapse was caused by ordinary traffic, now greater in amount and varied in character, particularly as to motor traffic, from that prevailing at the date of the passing of said Act.

Wilson J. declared that the "defendants were bound to keep the bridge known as Lady Bridge and specified in the pleadings, and also all retaining and other walls, fences, and embankments upon or connected with the county road passing over the said bridge in good and substantial and serviceable repair for, and in an efficient state for all the present-day ordinary traffic thereon."

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The defendants appealed to the Court of Appeal of Northern Ireland (1).

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J. M. Whitaker K.C., Megaw K.C., and Pringle K.C., for the defendants :—

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The facts are agreed on, and the net question left is what is the obligation of the Lagan Navigation Company. The question at issue is whether the Lagan Navigation Company is obliged to provide a bridge suitable for present-day traffic. The statute which first authorized its construction was 27 Geo. 2, c. iii. By the 54 Geo. 3, c. cexxxi, power was given to make, in addition to the canal, such other works as may be necessary. In this Act will be found the only section that exists (sect. 2) defining mode of construction of bridges and their approaches. Subsequently the Act of 54 Geo. 3, c. cexxxi, was passed, which, however, expired in 1835. By the Act of 6 & 7 Vict. c. civ, sect. 144, power was given to make new works, bridges, etc., and to repair and maintain old works; but new works were only to be made in connexion with new works and cuts. Sect. 159 of this same Act provided that the company was to make bridges over the canal where the canal crossed the county road. These bridges were to be made to the satisfaction of the Surveyor of County Antrim. Sect. 62 of 6 & 7 Vict. c. civ, dealt with both old and new works. The company was to make new works and maintain old works. The question is, what is the extent of the company's obligation as to maintaining and repairing works, bridges, etc.? Is the company bound to make a new structure sufficient to carry motor traffic of present day? Lady Bridge, the subject of this action, was constructed some time prior to 1843, when the Act 6 & 7 Vict. c. civ, was passed, and there was a hiatus from 1835 to 1842. Sect. 62 of 6 & 7 Vict. c. civ, imposed the obligation to maintain bridges, works, etc. There was, however, no obligation to construct new works or bridges. The obligation imposed as to the old works was no greater than that in regard to the new. The obligation was imposed upon both sets of works by the same words in the section. The obligation contained in sect. 159 of this Act, providing that works were to be made according to the specification and under the superintendence of the County Surveyor of Antrim, of course by its very nature could only affect new works. The old work was in esse at the time this statute was passed. The obligation was to maintain and keep in repair; the duty imposed under the statute was a duty to maintain only, not to reconstruct and enlarge. There was no obligation to make improvements, as the words used in the section are words of maintenance alone. The position was that once the company had complied with their obligation to make new works, thereafter their obligation was to maintain and keep

(1) In the Court of Appeal, before SIR DENIS HENRY, Bart., C.J., and MOORE L.J.

in repair both old and new works, bridges, etc. We rely upon two recent cases in the House of Lords: *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Attorney-General* (1) and *Attorney-General (Pickfords, Ltd.) v. Great Northern Railway Co.* (2). Prior to these cases, where a canal interrupted a public highway, it was held that there was a duty to keep the highway restored for public use: *Hertfordshire County Council v. Great Eastern Railway Co.* (3). The House of Lords dissented from this principle in *Sharpness New Docks v. Attorney-General* (1), as being too wide, and not a correct definition of the law. This was a change, and a complete alteration of the authorities. There, bridges were to be made according to specification, same as new works in the present case. So far as new bridges are concerned, there was the same obligation as here. As to the argument that sect. 62 of 6 & 7 Vict. c. civ. had not taken away the common law obligation, and that under the common law there is a duty to reconstruct, we refer to the speeches in *Sharpness New Docks v. Attorney-General* (1). Exactly the same obligation is imposed in regard both to old and new bridges. If no obligation is imposed to reconstruct new bridges (this is admitted), how can it be said that an obligation exists in respect of old works and bridges where the same words are used? Such an obligation can only be imposed by construing differently the same words in respect of old and new works. The standard is that existing at the date of passing of Act 6 & 7 Vict. c. civ. (1843). "Sufficient repair" must be construed in relation to the purposes for which the bridge was intended to be used. In *Sharpness New Docks v. Attorney-General* (1) it was decided that there was no duty to rebuild a defined structure to deal with increased traffic. In *Attorney-General (Pickfords, Ltd.) v. Great Northern Railway Co.* (2) it was held that the test of what condition bridge is to be maintained in is its condition at date of construction. There is no common law obligation running side by side with the express statutory obligation, nor is there any obligation to increase the strength of the bridge in any way. There was no obligation to maintain prior to 6 & 7 Vict. c. civ. "Purposes thereof" must be construed as referring to an existing structure. The whole general principle of the cases would be neutralized if the governing words are to be read as applicable only in futuro.

Herbert Wilson K.C., E. S. Murphy K.C., and Hume, for the plaintiffs:—

The principle applicable to this case is stated in the dissenting judgment of Lord Haldane in *Attorney-General v. G.N. Railway*. (2). Briefly, this principle is that where persons interrupt a highway, they are under an obligation to restore it to public use. No one quarrelled with the principle as it was enunciated

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(1) [1915] A. C. 654.

(3) [1909] 2 K. B. 403.

(2) [1916] 2 A. C. 356.

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by Lord Haldane. As to sect. 62 of 6 & 7 Vict. c. civ, the common law applied before it. There is nothing in this section which detracts from common law rights which immediately preceded it. The common law still applies, and it is still the law that whoever interferes with a highway is liable to restore it. In any case the statute must be construed against the company : *Stourbridge Canal Co. v. Wheeley* (1). The words "maintain and keep," which occur in sect. 62, are no weaker than the common law. The two cases of *Sharpness New Docks v. Attorney-General* (2) and *Attorney-General v. Great Northern Railway* (3) do not affect the present case in the slightest. The judgment of Buckmaster C. in *Attorney-General v. Great Northern Railway* (3) contains the ratio decidendi of *Sharpness New Docks v. Attorney-General* (2). Both these cases differ from the present case in that they refer to defined structures. Considerable importance must be attached to the judgment of Earl Loreburn in *Attorney-General v. Great Northern Railway* (3), and especially to those portions in which stress is laid on the law in regard to specific structures. We also rely on the dissenting judgment of Viscount Haldane (p. 369) in *Attorney-General v. Great Northern Railway* (3), and on the summing up of Lord Sumner in *Attorney-General v. Great Northern Railway* (3), p. 380. The common law liability is re-enacted in terms in the statute 6 & 7 Vict. c. civ. The Act is to be construed so as to give the greatest possible protection to the public. *Rex v. Kerrison* (4) and *Reg. v. Inhabitants of Ely* (5) were cases resembling the present case. We strongly rely on the words "in an efficient state" in sect. 62 of 6 & 7 Vict. c. civ. These words are quite different from those used in *Attorney-General v. Great Northern Railway* (3) and *Sharpness New Docks v. Attorney-General* (2).

In the Acts constituting the Lagan Navigation Company there was no provision in regard to particular fabrics. The two cases which have been so frequently referred to could not be applied to sect. 62 of 6 & 7 Vict. c. civ. The words which occur in sect. 62 were the very words found wanting in the two House of Lords cases; in these two cases a complete code exists; this differentiates them from the present case, where pre-existing common law liability is continued by sect. 62 of the Act 6 & 7 Vict. c. civ.

J. M. Whitaker K.C., in reply :—

"Keep and maintain" are the governing words of sect. 62 of the Act 6 & 7 Vict. c. civ, but maintenance does not involve reconstruction. There cannot be a common law obligation co-existing with a statutory liability. The obligation to keep the bridges in an efficient state does not involve that in future something entirely different may have to be set up. Where the obligation is defined, one must look to the statute alone.

(1) 2 B. & Ad. 793.

(2) [1915] A. C. 654.

(3) [1916] 2 A. C. 356.

(4) 3 M. & S. 526.

(5) 15 Q. B. 827.

SIR DENIS HENRY, Bart., C.J. :—

This was an action against the Lagan Navigation Company at the suit of the Attorney-General, the County Council of Down being relators, and is concerned with the obligation of the defendants, the Lagan Navigation Company, to repair a certain bridge near Moira, known as “Lady Bridge.”

The matters for decision in the form of questions are set out in a memorandum in writing agreed on by the parties, and these clearly appear in the judgment of Mr. Justice Wilson. He finds that “It is admitted that this bridge was built prior to 1843, and was vested in the present defendants by sect. 2 of 54 Geo. 3, c. ccxxxi, and is referred to in sect. 62 of 6 & 7 Vict. c. civ.

“Under the Lagan Navigation Acts, commencing with 27 Geo. 2, c. iii (Local), and down to 1843, various promoters were given powers for certain periods to make the Lagan Canal; and in 1843 their powers had all ceased, and it was necessary to provide more public money to complete and improve it; and the undertaking of the Lagan Canal, its bridges, works, ways, water-courses, etc., were vested in the defendant company, which was incorporated, and more money was granted to them to make further works and improvements; and by sect. 62 of 6 & 7 Vict. c. civ (Local), provision was made for the keeping and maintenance of, 1, the old works and undertaking, and, 2, the new works.

“It was admitted that ‘Lady Bridge’ and all retaining and other walls were, at the date of their construction and at the date of the passing of the Act 6 & 7 Vict. c. civ (Local), adequate to carry the ordinary traffic of the district served thereby, and that since 1843 the bridge was maintained in good and sufficient repair, adequate to carry the traffic of the district as existing at the date of the passing of the Act, and that in 1919 one of the retaining walls collapsed, and that such collapse was caused by ordinary traffic, then greater in amount and varied in character, particularly as to motor traffic, from that prevailing at the date of the passing of 6 & 7 Vict. c. civ (Local); and it was agreed that the only questions to be decided in this action were:— (a) Are the defendants bound to keep the bridge known as ‘Lady Bridge,’ and referred to in the pleadings, and also all retaining and other walls, fences, and embankments upon or connected with the county road passing over the said bridge in good and substantial and serviceable repair for, and in an efficient state for all the present-day ordinary traffic thereon; or (b) are the defendants only bound to keep the said bridge and also all retaining and other walls, fences, and embankments upon or connected with the said road in good and substantial repair for, and in an efficient state for all the ordinary traffic at the date of the passing of the Act 6 & 7 Vict. c. civ?”

The main question we have to consider arises on the construction of sect. 62 of 6 & 7 Vict. c. civ. I refer to the judgment of Lord Dunedin in *Sharpness New Docks v. Attorney-*

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General (1), where he says: "My Lords, I concur; and as to the construction of the statute (2), have nothing to add. I wish, however, to state explicitly my opinion that the whole question necessarily depends upon the proper construction of the statute; and that where the statute deals with the subject, its provisions form a code on that subject, and cannot be added to by what has been called 'a common law doctrine.'" It will be seen that the new works and improvements mentioned in the early part of sect. 62 are grouped with existing bridges, and the same words, "maintain and keep," are used in connexion with both, with a proviso that nothing therein contained shall make it compulsory on the said company to lay out more than twelve thousand pounds in new works and improvements.

We were referred by counsel to two cases in the House of Lords dealing with similar questions. The first is *Sharpness New Docks v. Attorney-General* (1), and the other is *Attorney-General v. Great Northern Railway* (3). The first turned on the construction of a Canal Act passed in 1791, and the second on the provisions of the Railway Clauses Consolidation Act, 1845.

I refer to the judgment of Lord Atkinson in *Sharpness v. Attorney-General* (1), where he says: "I cannot think the words 'supported, maintained, and kept in sufficient repair,' can be stretched to cover reconstruction in whole or in part so as to make the bridges so built and perfected something different from what they were left when finished according to the directions of the Commissioners. Restoration so to make them as near what they were when built, as time, wear, and the elements will permit, is in my view the very utmost that can be required from the appellants, the successors of the builders." In the present case the old bridges, of which "Lady Bridge" was one, were vested in the Canal Company by the 6 & 7 Vict. c. civ, and the words of sect. 62 as to repairs applicable to old bridges also apply to new works to be constructed by the company, with a provision in sect. 63 that the several works, improvements, and repairs hereby required and authorized to be made shall be performed and executed under the inspection and to the satisfaction of the Commissioners of Public Works in Ireland. The liability of the defendants depends on this statute. So far as new works are concerned, it seems to be clear that they are within the decision in *Sharpness Case* (1), and it is difficult to draw any distinction between the old and the new, which are covered by the same words in the same section.

I think, therefore, that the answer to the first question should be in the negative and the second in the affirmative; and, in addition, the declaration of the learned Judge should be varied by declaring that the defendants are only bound to keep the bridge in such good and substantial repair as sufficed for the traffic thereon in the year 1843. The appeal should be allowed, with costs.

(1) [1915] A. C. 654.

(2) The Worcester and Birmingham Canal Act, 1791.

(3) [1916] 2 A. C. 356.

MOORE L.J. :—

By Act of 27 Geo. 2, c. iii (Ir.), a certain corporation was granted a certain revenue derivable from duties, and empowered for promoting inland navigation in Ireland to open a passage by water between Lough Neagh and the town of Belfast, and the Act continued in force for eleven years from the 25th December following. By further Acts the term of eleven years was further extended from time to time by successive Acts for further short terms as each respectively expired; and by an Act of 19 & 20 Geo. 3, c. xxxii (Ir.), sect. 1, the corporation or its successors were further “hereby empowered to open all rivers and to make all such outlets, off-branches, cuts, navigations, trenches, passages, aqueducts, bridges, dams, and weirs as may by such company be judged necessary for carrying on the said works.”

By further statute of 54 Geo. 3, c. ccxxxi, the undertakers (sect. 2) were authorized, *inter alia*, “in such places as the company shall think fit to make deeper and wider as well the bed of the said River Lagan as the present canal of the said navigation, and also to repair, maintain, amend, and uphold all such works and other things as have already been erected, made, or done under or by virtue of the (above) recited Acts or any of them, and also to make, erect, . . . and perform all such works, matters, and things as shall be requisite and convenient for making, completing, and maintaining the several canals by this Act authorized and the navigation . . . and the several powers, authorities, provisions (in the recited Acts) so far as same are now in force respectively, and so far as the nature and circumstances of the case will admit, shall be used and exercised by the said company . . . and applied, enforced, and put in execution for making, completing, preserving, and maintaining the said several canals, improvements, and works by this Act authorized . . . in like manner as if works authorized by previous Acts had been authorized as part of the works.”

By sect. 6 it was provided that in all places where any cut or canal shall cross any public road, the ascent to every bridge to be made over such cut or canal for the purpose of such public road shall not be more than one foot in thirteen, and that the fence on each side of such bridge shall not be less than four feet above the surface of such bridge. The powers under that and the preceding Acts were further extended for twenty-one years from December 25th, 1814.

The Lady Bridge, with which the present proceedings are conversant, was constructed at some period prior to 25th December, 1835, when the powers conferred and continued by the previous Acts temporarily ceased to exist. The following admissions were made on behalf of the plaintiffs by notice of November 1st, 1922 :—

1. The bridge known as Lady Bridge and the retaining and other walls connected therewith in the pleadings referred to were constructed prior to the passing of the Act 6 & 7 Vict. c. civ (Local).

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2. The said bridge, and also all retaining and other walls, were at the date of their construction and at the date of passing of said Act adequate to carry the ordinary traffic of the district served thereby.

3. The ordinary traffic of said district has since the construction of the said bridge and since the date of passing of said Act increased in amount and varied in character, particularly as to motor traffic.

4. The said bridge, and also the retaining and other walls connected therewith, have been since their construction maintained in a good and sufficient state of repair, adequate to carry the traffic of the said district as existing at the date of the passing of the said Act.

5. The said bridge, and also the retaining and other walls connected therewith, have for several years prior to the year 1919 not been adequate to carry the ordinary traffic carried over the county roads in the said district as increased and varied in character, particularly as to motor traffic, since the date of said Act.

6. In the year 1919 portion of one of the retaining walls of the said bridge collapsed, and such collapse was caused by ordinary traffic, now greater in amount than and varied in character, particularly as to motor traffic, from that prevailing at the date of passing of said Act.

The first question for our determination is whether the defendants' predecessors in 1835 were bound to do more than maintain the Lady Bridge in a good and sufficient state of repair adequate to carry the traffic of the district as existing at the date of its erection; in other words, is the Lady Bridge on the facts, within the protection of the principle laid down in *Sharpness New Docks v. Attorney-General* (1) and *Attorney-General v. Great Northern Railway* (2)?

In the present case the company were empowered to make "all such . . . bridges . . . as may by such company be judged necessary for carrying on the works." The only statutory express limitation on their discretion as regards bridges is to be found in sect. 6 of the 54 Geo. 3, c. ccxxxi, relating to the ascent to every such bridge, to which I have already referred, and as to the side fences of such bridge. Apart from this, the adequacy of the bridge was a matter to be determined by the judgment of the company. In each case in the House of Lords there was a supervising authority. Does this make a vital difference? It may be said that in the present case there was afforded no protection for public interests, and that the company were made the judges in their own cause. But I think there is an answer to such a contention. In the first place, the powers conferred by these Acts were all designedly of a temporary character, and therefore limited. In the next, the works were to be carried out by the advance of public funds. A renewal Act became necessary

(1) [1915] A. C. 654.

(2) [1916] 2 A. C. 356.

at comparatively short periods, and at each renewal it was open to the Legislature to provide that additional works should be made and that reconstruction should be carried out if the state of the bridges required it, or to withdraw the grant. To my mind this is the dominant feature of the situation. The liability of the company expiring in December, 1835, was for twenty-one years from 1814, and only for that period, "to repair, maintain, amend, and uphold all such works and other things as had been already erected."

In *Sharpness Case* (1) there was no time limit; it was a perpetual obligation in saecula saeculorum from "time to time to support, maintain, and keep in sufficient repair." In the *Attorney-General v. Great Northern Railway* (2) the necessary works were to be maintained perpetually "at all times thereafter." Yet in each of these cases the House of Lords considered that the perpetual obligation was for maintenance only, and did not include reconstruction for increased necessities of traffic. Lord Buckmaster says (*Attorney-General v. Great Northern Railway* (2), at p. 364): An obligation in general terms from time to time to maintain and support such a bridge was only consistent with maintaining the structure that had once been erected"; and at p. 365: "I cannot think that these words mean the bridge is to be a changing and varying structure, altered from time to time to meet the growth of traffic wholly unforeseen and unexpected when the railway was made." Lord Sumner, at p. 379, says: "'Maintain' does not naturally mean 'maintain and alter,' nor does 'maintain such bridge' naturally mean maintain it, not as it was executed, but as something indefinitely different, stronger, more durable, and possibly of wholly dissimilar structure, material, or design."

Speaking for myself, I do not construe "amend" in the statutory power (which is not directly repeated in the statutory obligation for making, completing, preserving, and maintaining the said works authorized) as adding any additional liability to that of "maintenance" in the sense referred to by Lord Sumner. I do not think there is any liability on the Navigati n Company to reconstruct the Lady Bridge in the foregoing circumstances.

I have considered the position existing with regard to the Lady Bridge prior to 1843 before dealing with the next statute, on which so much argument took place before us. That Act was once more like its predecessors, a continuing Act, vesting all the property and all the powers of the former company in a new corporation, who are the present defendants. If the predecessors of the defendants were free from liability to reconstruct as distinguished from "maintain" the Lady Bridge prior to 1843, then, unless there is something in this Act to limit or alter this immunity, it must still exist.

The Act is the 6 & 7 Vict. c. civ (Local); and after transferring the property and powers of the former company to the defendants, it is provided by sect. 62 that "the company shall

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at all times during the continuance of this Act maintain and keep . . . all works, bridges, viaducts, preservation, retaining and other walls, fences, and embankments upon or connected with all county or other roads made and constructed by the said company, and all works to be hereafter executed for the improvement thereof, in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof and of the traffic on the same respectively."

By this Act powers are given to the Commissioners of Public Works to inspect and survey (sect. 64), and to require the company, "if the Commissioners shall be of opinion that any repairs are necessary to be performed for the due and sufficient maintenance of . . . the works" (sect. 65), to execute same accordingly.

By sect. 165 it was enacted that "when and so often as any portion of the works hereby directed to be made in relation to or connected with county or other roads shall require to be repaired or maintained, it shall be lawful for the County Surveyor of Antrim to require the company to repair and maintain the same." These sections *prima facie* dealt with repairs coupled with maintenance. This is taken as applying only to works directed by the statute now in recital, and by sect. 159 such future bridges were to be good and sufficient, and constructed under the superintendence of the Surveyor of County Antrim and the engineer of the defendants.

Parliament, however, did not lose its control over the defendant company, for their statutory powers under the Act were only to last for thirty-one years; and if not then further continued (sect. 123), the undertaking was to be conveyed to the Commissioners of Public Works in Ireland. In my opinion sect. 62, read with the other provisions of the Act, continues, though in different words, the immunity from the obligation to reconstruct enjoyed by the defendants' predecessors in respect of the Lady Bridge.

But suppose that I am wrong in my opinion that such immunity existed in respect of the Lady Bridge and bridges built prior to the Act, what is the effect of this section? This is Mr. Whitaker's argument. If such bridges were not immune, then surely they gain immunity by this section. For *all* bridges and works in existence or thereafter to be executed are to be subject to the same obligation to repair. So far as maintenance and repair is concerned, the obligation in respect of all bridges is exactly the same. So far as construction of the new works is concerned, the case would appear to be on all fours with the facts in both the House of Lords cases referred to (except as to the duration of statutory powers, since extended).

No limitations on construction could, from the nature of things, be laid down for bridges already in esse. What creates or absolves from the liability to reconstruct is the form of the statutory obligation for "maintenance." Can it be said that without any differentiation in the language of the section the

same words in the section are to be given different effects on the whole subject-matter of works and bridges the present or future property of the defendants according to date of erection, though the statute does not say so? I think we cannot accept this view.

To conclude the actual history of legislation; in 1873, by further Act reciting that the defendants "had conducted themselves well in the management of the navigation" (a reference to the powers of Parliamentary control), the Act of 1843 was further extended for a term of thirty-one years, and this, subject to certain conditions, was subsequently extended to 999 years by the Ulster Canal and Tyrone Navigation Act of 1888, Parliament thereby losing its control at each renewal over the defendants. It may be regretted that Parliament took this course, but that fact cannot affect the construction of the earlier statutes at the date at which they were passed.

I am of opinion that the learned Judge was wrong in declaring that the defendants were bound to keep the bridge in good and substantial and serviceable repair for all the present-day ordinary traffic thereon, and that the declaration ought to be that the defendants are not compellable to do more than maintain and keep the bridge in such good, substantial, and serviceable repair as sufficed for the traffic thereon in the year 1843.

I think the appeal should be allowed with costs, and that the action should be dismissed with costs accordingly.

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Solicitor for plaintiffs: *R. J. Dickson.*

Solicitors for defendants: *White, M' Millan, & Wheeler.*

J. M'C.

Ch. Div. IN THE MATTER OF ELLIS JONES, DECEASED. EDWARD
(I. F. S.) HAMILTON AND OTHERS, PLAINTIFFS, *v.* ELLIS EDWARD
 1923. LINAKER AND MARY BEATRICE HUGHES, DEFENDANTS.
 Mar. 20, 27. AND BY ORDER TO PROCEED, EDWARD HAMILTON AND
 WALTER WILLIAM HUGHES, PLAINTIFFS, *v.* THE PUBLIC
 TRUSTEE IN ENGLAND AND ELLIS EDWARD LINAKER AND
 MARY BEATRICE HUGHES, DEFENDANTS (1).

Practice—Administration—Interest on legacies—Deduction of income tax from interest.

Executors are entitled to deduct out of interest payable to legatees income-tax assessed on such interest at the current rate.

ACTION for the administration of the estate of Ellis Jones, deceased.

The subject-matter of this report arose on the motion for allocation of the funds in Court. The funds in Court amounted to £32,527 11s. 1d. cash, £4,210 9s. 8d. Five per cent. War Loan, and £10,392 18s. 4d. Four per cent. War Loan. In part 3 of the allocation account the various legacies payable were set out. These were ten in number, and on each interest for eighteen months at the current rate was payable. The Public Trustee and Walter William Hughes, executors of Mrs. Louisa Anne Jones, deceased, were entitled to the residue. No deduction was made by the Chief Clerk in respect of income tax from the interest on the legacies set out in part 3 of the allocation account, and the Chief Clerk stated that in not making such deduction he was following the practice of the Court. The interest on the legacies in part 3 of the allocation account amounted to £1,060, and at the current rate of 5s. in the pound the income tax on this sum would amount to £465. The Public Trustee, as entitled to the residue, contended that income tax at the current rate should be deducted from the interest on the legacies. The arguments of counsel and the authorities cited appear sufficiently in the judgment.

F. Price K.C., for the Public Trustee.

Wakely, for the plaintiffs.

PIM J. :—

This is an administration action, and the estate to be administered is almost wholly composed of stocks and shares in various companies. The testator bequeathed varying and large sums to several legatees, and he nominated a residuary legatee.

(1) Before **PIM J.**

Owing to the exigencies of the administration, it was impossible to pay the legacies at the end of a year from the testator's death, and at the end of that year the various legatees became entitled under Order 55, rule 68, to receive 4 per cent. per annum on their several legacies. The executors have from time to time received the interest on the testator's stocks and shares, less by income tax, which was deducted at the source. As a result, the share coming to the residuary legatee will be cut down by a large sum, the amount of the said tax.

The rule under which the 4 per cent. is paid runs as follows: "Where a judgment or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of 4 per cent. per annum from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will, and in that case according to the will."

The Public Trustee, on behalf of the residuary legatee, now claims to deduct income tax from the yearly interest payable to the legatee under this rule. Up to the present, the practice in Ireland has been to pay the said 4 per cent. without any deduction of income tax. It is a practice which has existed for a long period of time without being questioned, and it should not now be lightly upset.

The practice in England is, and has apparently always been, to allow the deduction. As early as the case of *Wood v. Penoyre* (1) a deduction of property tax (income tax not then existing) was allowed. Since the creation of income tax the same practice has existed; and in Seton on Decrees, vol. ii, p. 1415, the form provides for the deduction.

Apart from the long-standing practice, the legatees have argued that the 4 per cent. was paid, not by way of annual interest on the amounts due to the legatees, but by way of compensation for the damage caused by withholding the amounts of the legacies. This contention seems to me to be wholly untenable. True it is that this view was put forward by counsel in the case of *Dinning v. Henderson* (2), but the learned Vice-Chancellor who tried the case did not even allude to it in his judgment, which consisted in a refusal to pay without deduction on the ground of long-standing practice. The facts of that case were peculiar, and its validity may be doubted, not on the ground that income tax should not be deducted in an ordinary case, but on the ground that interest on a six months' bill, which did not carry interest, was not within the words, "any yearly interest of money or any annuity of other annual payment," in 16 & 17 Vict. c. 34, sect. 40.

The case of *Goslings & Sharpe v. Blake* (3) was cited to me. That was a case of a claim to deduct the tax from interest payable on short loans contracted with a bank, and it was held—and, I think, rightly held—that such short loans did not come

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(1) 13 Vesey, 316.

(3) 28 Q. B. D. 324.

(2) 3 De G. & Sm. 702.

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within the above words. It does not seem to me to touch the present case at all.

In discussing the case of *Bebb v. Bunney* (1), Lord Esher M.R., at p. 328, used the following words: "I take it, the ordinary form of mortgage has in it a term that, if the money is not paid on the fixed day, the interest shall go on, and in that case it is clear that payment of the interest may go on for more than a year." And Bowen L.J., dealing with interest payable on short loans, says, at p. 331: "It seems to me it is not yearly interest at all; it is not calculated with reference to a year in any sense, although it is true that it is expressed in a notation which is borrowed from the language of cases where there are yearly loans, or where the interest is calculated by the year. It is convenient to express in that notation the amount of interest that is to be paid, but it is not calculated by the year, nor on the supposition that the loans would last for a year; therefore it is not yearly interest. When it runs over, then the interest becomes payable during the times it runs over, and is calculable with reference to the time it is outstanding, and the case may there be different. If this view is right, we are not overruling what is said in *Bebb v. Bunney* (1). The Vice-Chancellor there expressly confines his judgment to interest at a yearly rate which may have to be paid *de anno in annum*, such as interest on purchase-money or mortgage interest; and the only ground in which I differ respectfully from the Court below is that they seem to think that *Bebb v. Bunney* (1) necessarily governs this case."

In *Goslings' Case* (2) the Court did not overrule *Dinning v. Henderson* (3), but they doubted its correctness. In 1907 the case of *In re Craven's Mortgage*, *Davies v. Craven* (4), came before Mr. Justice Warrington (now Lord Justice Warrington). It was also the case of a mortgage; and the learned Judge, having gone fully into all the reported cases, came to the clear conclusion that *Bebb v. Bunney* (1) governed the case before him, and that *Goslings' Case* (2) did not apply; and held "That, inasmuch as interest was calculable by the year, it was 'yearly interest' within sect. 40 of the Income Tax Act, 1853, although it was payable in a lump sum at an uncertain date, and that the mortgagor's executor was entitled to deduct income tax."

These are all the cases to which I desire to refer, but they seem to me to establish the Public Trustee's contention. Let me again call attention to the words of rule 68, that a rate of 4 per cent. per annum from the end of one year after the testator's death shall be paid, unless otherwise ordered. I am informed by the Chief Clerk that this interest is always paid in a lump sum along with capital; and Mr. Wakely, on behalf of the legatees, argued that that showed that it was not in the nature of yearly interest. That point was met and decided by Lord Justice Warrington in *In re Craven's Mortgage* (4). It is

(1) 1 K. & J. 216.
(2) 23 Q. B. D. 324.

(3) 3 De G. & Sm. 702.
(4) [1907] 2 Ch. D. 448.

not suggested, in the words of Lord Esher, that the payment of this interest might not go on for over a year. There are cases in which it would go on for several years. It is not suggested that this is in the nature of a short loan, which would bring it within *Gosling's Case* (1). Can anyone doubt from the words of the rule that the interest payable thereunder is not only in its notation, but in its meaning, a yearly interest—that, in the words of Lord Justice Bowen, “it is calculated by the year”? It has been suggested that 4 per cent. is a small interest, and may be less than the executors are receiving. That is a matter for the Rules Committee; but in any case the Court would have power, in a specific and proper case, to increase the interest payable; and I do not think any point can be made in respect of the amount of the interest. In this case, certainly, it is not just to the residuary legatee to make him pay the whole of the income tax, and I have come to the conclusion, from a consideration of the various cases cited to me, that it would not be according to law. It is with the greatest compunction that I upset any old practice; but having come to a clear conclusion, it is only right that I should give effect to my opinion.

I hold that the executors are entitled to deduct from the amount of interest payable to the various legatees income tax at the current rate. If I am wrong in this, the Court of Appeal will set me right.

Solicitors for the Public Trustee: *Messrs. Baker, Raywood, & Gordon.*

Solicitors for the plaintiffs: *Messrs. Hamilton & Craig.*

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IN THE MATTER OF PHILIP MAGUIRE, A PERSON OF
UNSOUND MIND, DECEASED.

*Lunacy—Insolvent estate—Claims for maintenance and committee's costs—
Priority.*

A person of unsound mind having died insolvent, arrears due for maintenance to the institution where he had been kept were allowed after debts due to the Crown, and in priority to the taxed costs of his committee.

MOTION ON NOTICE.

Philip Maguire, the deceased in this matter, died on the 23rd January, 1921, leaving assets amounting to £437 17s. 1d. As against this there were claims amounting to upwards of £600, including £166 17s. 11d. succession duty payable in respect of property to which the deceased succeeded on his brother's death; £173 3s. 9d., balance due to St. Patrick's Hospital for maintenance of the deceased; and £170 7s. 8d., the taxed costs of the committee. The balance available for distribution (after providing for the amount due for succession duty) being insufficient to pay both the taxed costs of the committee and also the arrears of maintenance, the question as to the priority of these two last-mentioned claims came before the Court.

Morgan Byrne, for the committee:—

The committee is in the position of a trustee acting under the direction of the Court, and is entitled to her costs in priority to the debt due to the hospital; *Daniel's Chancery Practice*, 5th ed., pp. 1271-2.

Meredith K.C., for St. Patrick's Hospital:—

In lunacy, claims for maintenance are paramount: *Abraham on Lunacy*, pp. 161-2; Order 39 of the General Order (England), 1853, *Elmer's Practice in Lunacy* (1877), p. 342; cf. rule 119 of the rules of 1890; *Pope on Lunacy* (1890), p. 119; *In re Knight* (unreported), cited in *Shelford on Lunacy* (1847), p. 133. Maintenance takes priority over debts: see the judgment of Lord Eldon C. in *Ex parte Hastings* (1); see also *In re Plenderleith* (2).

MOLONY C.J. made an order declaring St. Patrick's Hospital entitled (after payment of succession duty) to arrears due for maintenance in priority to the claim of the committee for her taxed costs.

Solicitors for the committee: *Thomas Gerrard & Co.*
Solicitors for St. Patrick's Hospital: *Rooke & Rooke.*

T. C. T.

IN THE MATTER OF MARGARET HOOD, A PERSON OF
UNSOUND MIND.

I. F. S.
(in Lunacy).
1923.

Husband and wife — Advancement — Joint account — Deposit receipt — Death of husband intestate — Deposit receipt excluded in estimating the wife's distributive share.

Feb. 12.

A husband placed a sum of money on deposit receipt in the joint names of himself and his wife, and died intestate and without issue.

The widow, having been found to be a person of unsound mind, a question arose whether in estimating the amount of her distributive share of her husband's assets she was bound to give credit for the sum which she received as survivor in the joint account.

Held, that the widow was entitled to the amount of the deposit receipt and to her charge of £500 under the Intestates' Estates Act, 1890, and her one half of his residuary personal estate.

William Young Hood, on the 10th May, 1918, placed the sum of £545 on deposit receipt in the Bank of Ireland, Arklow, in the joint names of himself and his wife, Margaret Hood. He died intestate on the 15th December, 1920, and letters of administration were granted to his brother, Robert Hood, on the 15th June, 1921. Having died intestate and without issue, his widow, Margaret Hood, became entitled to a charge of £500 on his assets under the Intestates' Estates Act, 1890, in addition to her half of the residuary personal estate under the Statute of Distributions.

Robert Hood, the administrator of William Young Hood, deceased, sought to have it declared that Margaret Hood was bound to give credit as against any benefit she was entitled to receive from the assets of the said deceased for the said sum of £545 and interest thereon; or, in the alternative, that Margaret Hood was bound to give credit as against such benefit for the interest which accrued on the deposit receipt from the 7th April, 1919, to the 15th December, 1920, the date of the death of the said William Y. Hood.

A. D. Bolton, for the administrator :—

The widow cannot claim both the sum placed on deposit and her distributive share. It is settled that if a deposit be made with a bank by a husband of his own money in the names of himself and his wife, there is a presumption that it is intended as an advancement for the wife in the event of her surviving her husband : *In re Condrin* (1). Here the husband, by placing this money on deposit in the joint names of himself and his wife, intended to make a provision for his wife in the event of his death, placing himself much in the same position as if he had covenanted in his lifetime to leave her that sum of money. Where a husband covenants to leave, or that his executors shall pay, to

(1) [1914] 1 I. R. 89.

I. F. S. his widow a sum of money, and he dies intestate, so that she
(in Lunacy). becomes entitled to a portion of his personal property under the
 1923. Statute of Distributions, such distributive share shall be a per-
In re formance of the covenant, and she cannot claim both: Williams
Hood. on Executors, 11th ed., p. 1234; Ingpen on Executors, 2nd ed.,
 p. 515; *Blandy v. Widmore* (1), and notes thereto in White and
 Tudor, L. Cas., 8th ed., vol. ii, p. 413. The Court leans against
 double satisfactions: *Lee v. D'Aranda and Cox* (2); *Garthshore*
v. Chalie (3). The wife could not get the money in her husband's
 lifetime; she only took it in the event of his predeceasing her.
 There is nothing in the transaction in the nature of a debt
 incurred to the wife by the husband which might exclude the
 rule. [He also cited *In re Hogan* (4).]

St. L. Devitt, for the committee of Margaret Hood:—

The widow is entitled to the sum placed on deposit as well
 as to her share under the statute. As regards the sum placed
 on deposit, the Court must look at the nature of the transaction
 in the absence of any evidence to explain what was the intention
 of the husband, and treat the deposit as made for the purpose of
 augmenting the means that the widow was to have if she survived
 her husband: *In re Eykyn's Trusts* (5); *Dummer v. Pitcher* (6).
 The law as to the wife's share in the event of her husband dying
 intestate and without issue, as stated in Halsbury's Laws of
 England, vol. xi, pp. 16, 17, rule No. 2, is that the widow can
 claim both the money on deposit and her share under the statute.
 [He also referred to rule No. 4, p. 19.]

March 26.

MOLONY C.J., having stated the facts, continued:—

It has been argued that a wife to whom money is given by
 her husband in his lifetime is bound, upon the distribution of
 his assets upon an intestacy, to bring into account such sums in
 the same way as children are bound to do under the 2nd section
 of the Irish Statute of Distributions. That section is, in terms,
 confined to children.

There are, however, a number of cases in which it has been
 held that a wife may, by agreement, exclude her title to partici-
 pate under the Statute of Distributions, and that such an
 agreement will apply equally in favour of the next-of-kin as of
 the legatees under the will of her husband—that is, whether the
 husband dies intestate or testate. [See Ingpen on Executors,
 p. 522; Williams on Executors, vol. ii, p. 1362.] It is un-
 necessary to refer to the cases where it has been held that if a
 husband covenants to leave or pay at his death a part of his
 estate or a sum of money to his widow, such covenant will be
 deemed satisfied by a distributive share to which, on his

(1) 1 P. Wms. 323.

(2) 1 Ves. Sen. 1.

(3) 10 Ves. 1.

(4) [1901] 1 I.R. 168.

(5) 6 Ch. Div. 115, at p. 119.

(6) 2 My. & K. 262.

intestacy, she becomes entitled under the statute, either wholly, if such share is more than his covenant to be left or paid, or pro tanto if less: *Garthshore v. Chalie* (1); *Blandy v. Widmore* (2); *Lee v. D'Aranda and Cox* (3). It seems to me that the nearest case in principle to this is *Lang v. Lang* (4). In that case, in the events which happened, the husband was bound by a deed to produce a sum of £4,000 and invest it for his wife's benefit. In the present case the husband has in fact produced £545 and done the same thing; and it seems to me that the observations of the Vice-Chancellor in *Lang v. Lang* (4) are applicable. He said, at p. 465: "*Blandy v. Widmore* (2) and *Lee v. Cox and D'Aranda* (3) have no application to the subject; because these cases decide only that, where the husband has bound himself to fulfil some obligation by the payment of money or by doing an act equivalent to the payment of money at the time of his death (whether it be at the time of his death, or within six months after, makes no difference), that obligation is satisfied if, by dying intestate, he allows the law to confer a benefit on the covenantee equivalent to that which he had bound himself to confer. Those cases have no reference to the subject, there being in this case an obligation on the husband to produce the sum in question; and, in my view, it is the same thing as if there had been a covenant with a trustee to make a settlement of that sum in the manner provided for; and then, if the husband had died intestate, the trustee would have taken from his assets what was sufficient for the purpose, and the wife would have been at liberty to take her share of the residue under the Statute of Distributions." The Vice-Chancellor in that case declared the widow entitled to the £4,000, with interest at £4 per cent., from her husband's decease, and also to her distributive share of his personal estate; and similarly here I declare the widow entitled to the £545, with interest, from her husband's decease, and also to her distributive share of his personal estate.

Accordingly the first part of this application must be refused. As regards the second part, relating to the interest on the sum deposited, there is no difficulty: the administrator is entitled to the interest up to the time of the death of William Young Hood.

Solicitors for Robert Hood: *Hamilton & Craig*.

Solicitors for the committee of Margaret Hood: *M. J. O'Connor & Co.*

H. H.

(1) 10 Ves. 1.

(2) 1 P. Wms. 324.

(3) 1 Ves. Sen. 1.

(4) 8 Simon, 451.

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Wilson J.

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WATT AND OTHERS v. MACLAUGHLIN AND OTHERS.

Club—Golf club—Alteration of rules—Validity—Jurisdiction of Court to consider—Property and rights of members not affected.

May 2, 3, 9.

The P. club was established some time prior to 1888 for the purpose of playing golf. The original rules neither permitted nor prohibited the playing of golf on the links on Sundays; but in the year 1895 a code of rules was adopted, one of which provided that golf should not be played on the links on Sundays. These rules prescribed that no rule should be repealed or altered or new rule made except at a general meeting, after notice of the proposed change had been sent to each member. Rule 37 prescribed that no future motion to open the links for play on Sundays should be passed unless by a majority of two-thirds of those present and voting. In July, 1922, new rules were passed at a special general meeting which amounted to an entire repeal of the old rules; and in August, 1922, a resolution was passed by a majority of less than two-thirds permitting the playing of golf on Sundays, subject to such rules and regulations as the council might consider expedient.

Held, applying the principle of *Emperor of Austria v. Day and Others* (3 De G. F. & J. 253), inasmuch as the rights or privileges of members of the club had not in any way been affected, nor the property of the club in any way injured, that the Court had no jurisdiction to consider the legal validity of the rules of the club, nor to grant an injunction against the commission of acts merely criminal or merely illegal; and *held* further, on the evidence that notice of the proposed change was properly given, and that the repeal of rule 37 (which required a two-thirds majority) did not itself require a two-thirds majority.

Held also, that if playing of golf on Sundays be contrary to statute 7 Wm. 3 (Ir.), c. 17, sect. 3, and a criminal offence, the Chancery Division is not the proper tribunal to determine that question.

TRIAL OF ACTION.

The plaintiffs were members of the Royal Portrush Golf Club. They brought this action on behalf of themselves and other members of the club, claiming, inter alia, a declaration that a motion passed at a special general meeting of the club on August 26th, 1922, was not duly carried. One of the defendants was the captain of the club, two of them were trustees, one of them was the secretary, and all of them except the secretary were members of the council. The club was formed prior to 1888 for the purpose of playing golf on the links at Portrush; and by the original rules the rules of the club could be altered at a general meeting of the club provided notice of the proposed change was sent to each member a certain time before the meeting called to consider the change. There was no rule in the original rules permitting or forbidding the playing of golf on the links on Sundays. Rules were adopted in 1895 which, so far as material, were as follows:—

“Rule 35. The clubhouse, with the exception of the bar and billiard-room, shall be open on Sundays.

“Rule 36. Golf shall not be played on the links on Sundays.

“Rule 37. No future motion either to open the bar or billiard-room, or to open the links for play on Sundays, or to alter

rule 35, shall be passed unless by a majority of two-thirds of those present and voting at such meeting.

“Rule 24. No rule of the club shall be repealed or altered or new rule made except at a general meeting. Notice of the proposed change must be sent to each member of the club at least ten days previous to the meeting called for its consideration.”

A special general meeting of the club was held on July 8th, 1922, to consider the adoption of new rules to supersede the existing rules. The suggested new rules were considered one by one, and passed without any division, subject to amendments. On 26th August, 1922, a special general meeting was held, when a motion to alter new rule 32 by striking out “Golf shall not be played on Sunday,” and substituting therefor “Golf may be played on the links on Sunday, subject to such rules and regulations as the council may consider expedient,” was carried by 138 votes to 71. The majority was composed of 47 members who were present and 91 proxies. The minority was composed of 47 members who were present and 24 proxies. Under the new rules which had been adopted at the special general meeting proxy voting was permitted. Upon the passing of this motion at the special general meeting of August 26th, 1922, the plaintiffs commenced this action.

The *Attorney-General*, *R. Best K.C.*, *M.P.* (N.I.), *Megaw K.C.*, *M.P.*, and *Black*, for the plaintiffs:—

The question to be tried is whether or not the rule had been properly made enabling golf to be played on Sundays on the links of the club. The notice convening the meeting of 8th July, 1922, did not contain any notice of intention to repeal the rule which provided that no future motion to open the links for play on Sundays should be passed unless by a majority of two-thirds of those present and voting at such meeting. This rule was quietly dropped when the new rules were proposed and passed. Attention should have been drawn to the particular instances in which there was a departure from the existing rules and regulations. We contend that the notice was insufficient, and that, even if it were sufficient, the only way the rule could be repealed was by a specific motion; and it certainly could not be repealed by a bare majority. It could certainly not be repealed by simply omitting it from the new rules. That being so, the rule enabling golf to be played on Sundays was not duly passed, as it did not receive the requisite two-thirds majority. The statute of 7 Wm. 3, c. 17, sect. 3, applies.

[They also referred to *Normandy v. Ind, Coope, & Company, Ltd.* (1); *Thellusson v. Viscount Valentia* (2); *Young v. Ladies' Imperial Club* (3); *Guaranty Trust Company of New York v. Hannay & Co.* (4); and *Harrington v. Sendall* (5).]

(1) [1908] 1 Ch. 84.

(2) [1907] 2 Ch. 1.

(3) [1920] 2 K. B. 523.

(4) [1915] 2 K. B. 536.

(5) [1903] 1 Ch. 921.

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Murphy K.C., Macafee K.C., and M'Guckin, for the defendants:—

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There was no precedent for an action of the present kind. There was no case that could be cited where a member of a club had obtained an injunction against a club except to restrain it from excluding him from the club premises. The Courts had never compelled the members of a club to use the club premises in any particular manner. There was no suggestion that either the property or the rights or interests of any of the plaintiffs or of any member of the club were restricted or interfered with by the amendment of the rules, which was challenged in the present action. We submit that unless some right of property was invaded, or some interest affected or restricted, the Courts would not interfere with the domestic affairs of a club such as this. Why should the Court be asked not to restrain an individual, but to compel the council of this club to restrain other persons from committing a breach of 7 Wm. 3, c. 17, sect. 3? As to the question of the sufficiency of notice, we contend that the notice was sufficient. As to the two-thirds rule, we say that it had been repealed in July.

[They also referred to *Theellusson v. Viscount Valentia* (1); *Digby v. Connol* (2); *Baird v. Wells* (3); *Forbes v. Eden* (4); *Attorney-General v. Sheffield Gas Consumers' Co.* (5); *Attorney-General v. Guardians of Poor of Union of Dorking* (6); *Temper-ton v. Russell* (7); *Duke of Bedford v. Ellis* (8); *Reid v. Wilson* (9).]

May 9th.

WILSON J.:—

This action is brought by the plaintiffs, four members of the Royal Portrush Golf Club, on behalf of themselves and all other members of the club who object to a certain motion purported to have been passed at a meeting of the club held on the 26th day of August, 1922, against the defendants, who are sued on behalf of themselves and all other members of the club other than those represented by the plaintiffs. The object of the action is to have it decided that the motion objected to was not legally passed, and to have it declared that a rule hereinafter set out prohibiting the playing of golf on the links on Sundays is a subsisting rule of the club, and that another rule prohibiting the passing of any motion to alter the last-mentioned rule except by a majority of two-thirds of those present and voting at a general meeting is also a subsisting rule of the club, and for a further declaration that the enacting of any rule purporting to sanction or enable the playing of golf on Sundays is ultra vires the club, and for an injunction to restrain the defendants and each of

(1) [1907] 2 Ch. 1.

(2) 14 Ch. D. 482.

(3) 44 Ch. D. 661.

(4) 1 H. L. Sc. App. 568.

(5) 3 De G. Mac. & G. 320.

(6) 20 Ch. D. 595.

(7) [1893] 1 Q. B. 435.

(8) [1901] A. C. 1.

(9) [1895] 1 Q. B. 315.

them and the council for the time being of the said club from opening the links of the club for play on Sundays, or from sanctioning or permitting the playing of golf on the said links on Sundays, and other relief.

The defendants are the captain, trustees, and members of council of the club elected pursuant to certain rules of the club which were, to use the plaintiffs' phrase, purported to have been passed at a general meeting of the club held on the 8th of July, 1922. Objections were taken by the defendants' counsel to the frame of the action, and to the representative character in which the defendants are sued. From the view I take, it is not necessary to determine these questions; but if I am wrong in my opinion, serious questions would arise as to whether it would not be necessary for the plaintiffs to prove, 1, that each of the defendants is in favour of the playing of golf on these links on Sundays; 2, that the defendant Waddell, who is only the paid secretary of the club, and has not been proved to be an ordinary member of the club, can be made responsible for the costs of this action; and, 3, whether the defendants are now the captain, trustees, and members of the council of the club, inasmuch as it is contended that the new rules passed on 8th July, 1922, under which they were in fact elected, are not legally the rules of the club, and that the old rules of the club in force up to the date of that meeting have never been legally altered or repealed, and are now binding on all the members; and whether the defendants in these circumstances can properly be sued as representatives of the other members of the club who do not agree with the plaintiffs on the subject of playing golf on these links on Sundays.

The plaintiffs do not allege in their pleadings, nor have they given any evidence to prove that their rights, interests, and privileges as members of the club have been in any way interfered with, or that the property of the club in which they are jointly interested with the other members has been in any way injured, nor is there any claim for damages for breach of contract in this action. It is contended by the defendants that the Court of Chancery has no jurisdiction to enter into the consideration of the legality or otherwise of the proceedings of the club and the validity of the rules purported to have been passed by the club at its meetings, as no question affecting the plaintiffs' rights and interests in property is involved. There can be no doubt that the members of an unincorporated members' club such as this is are bound inter se by the rules of the club as if they had each signed a contract to that effect, and that they are jointly interested in the property of the club. In *Wise v. The Perpetual Trustee Co.* (1) Lord Lindley, at p. 149, stated: "Clubs are associations of a peculiar nature. They are societies, the members of which are perpetually changing. They are not partner-

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ships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member." This club, consisting of more than twenty persons, would be an unlawful association under the Companies Acts if it were an association for gain. In truth, the interest a member has in the property of a club is that on payment of his subscription he is entitled to enjoy the privileges of a member, and to use the property of the club during his life, or so long as he pays his subscription; and if the club is wound up in his lifetime, he is entitled to his share of the club property after all the liabilities of the club have been discharged. A member has no transmissible interest in the property of the club, and he can withdraw from the club when he wishes. The only privilege which the plaintiffs complain they have been deprived of is the privilege of preventing other members of the club playing golf on Sundays. Counsel for the plaintiffs have not been able to refer me to any case where a declaration or an injunction was granted by the Court of Chancery in such circumstances. They contend that wherever you have an unincorporated voluntary association bound by a constitution or rules, and that association possesses property, this Court must, at the instance of any of the members, decide the proper construction of that constitution or those rules, and determine the legality and validity of the rules, though no question affecting the property arises. The same law applies to the members of any voluntary church or any other unincorporated association of persons formed for some purpose other than the acquisition of gain. Abstruse questions of theology would have to be determined in this Court where no property was affected. The case of *Overtoun and The Free Church of Scotland* (1) decided such a question, but only because on the decision depended whether the majority of the Free Church of Scotland had power to compel the minority of that Church to follow them into the Union on pain of loss of all interest in the Church's general and congregational property. In that case Lord Davey, at p. 643, said: "The subject-matter of this action is certain heritable and movable property, which is held by trustees in trust for the Free Church of Scotland . . . The complaint of the pursuers and appellants, so far as it is cognisable by a civil Court, is that their trustees, at the bidding of other members of the Free Church, but in breach of their trust, have applied and threaten and intend to apply the trust property to purposes which are alien to the purposes of the trust, and for the benefit of persons who have no title to call themselves members of the Church." Lord James, at p. 655, says that "the jurisdiction of the Courts to determine the difference between

(1) [1904] A. C. 515.

the two sections of the Free Church of Scotland proceeds from the fact that property held by trustees upon certain trusts has lately been dealt with or sought to be dealt with for purposes outside the original trust"—and the judgments of the other Law Lords all proceed on the same basis. Counsel for the defendants on this point relied on *Forbes v. Eden* (1), in which case the pursuer, a minister of the Scotch Episcopal Church—a voluntary association—complained that he was appointed to a living in that Church under the canons of 1838, and that in 1863 a new set of canons was issued by the governing body which the plaintiff had conscientious objections to obey. Owing to his disobedience he might be deprived of his living, be turned out of the Church, and lose other benefits he had hitherto enjoyed as such minister, and asking for a declaration that the new set of canons was not properly issued, and was not binding on him. Up to the time of bringing the action he had not been deprived of his living or suffered any of the other damage he anticipated. The Lord Chancellor said: "Supposing the plaintiff to have really suffered damage by reason of the canons of 1863, it would have been open to the Court to consider whether the Synod had authority to make the canons from which the civil injury had arisen. But actual damage flowing directly from the canons of 1863 is wholly out of the question. The Court had therefore to consider whether it could properly entertain the question of the reduction of the canons on the ground that they were a departure from the doctrine and discipline of the Church at the time the plaintiff became one of its members. Now, this it refused to do, as it is a mere abstract question, involving religious dogma, and resulting in no civil consequences which would justify the interposition of a civil Court." And Lord Cranworth said: "Save for the due disposal and administration of property, there is no authority in the Courts, either of England or Scotland, to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs." The House of Lords and all the Scotch Courts which heard that case refused to give Mr. Forbes any relief, as he had suffered no loss. *Forbes v. Eden* (1) was quoted in the *Free Church of Scotland and Over-toun* (2) in 1904, and no one suggested that above statements of the law were not accurate at that time. They agree with statements to the same effect in all the club cases, and also with the law as to injunctions laid down by the Court of Appeal in the *Emperor of Austria v. Day and Others* (3), where Turner L.J. says: "I agree that the jurisdiction of this Court in a case of this kind rests upon injury to property, actual or prospective; and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any right to property." I am bound by these authorities; I am unable to find that the plaintiffs' rights or privileges as

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(1) 1 H. L. Sc. App. 568. (2) [1904] A. C. 515. (3) 3 De G. F. & J. 253.

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members of this club have been in any way affected, or that the property of the club in which they are interested has been in any way injured by the acts complained of. This would be sufficient to determine this case, and to compel me to refuse to grant the relief claimed in this action by the plaintiffs, and to hold that in this case I have no jurisdiction to consider the legal validity of the rules of this club. Mr. Megaw K.C., for the plaintiffs, insists that the case of *Young v. Ladies' Imperial Club* (1) shows that the jurisdiction of this Court has been enlarged, and the practice as to granting injunctions altered, since the foregoing cases were decided. This case was first quoted by Mr. Megaw K.C. in his able reply, and the defendants' counsel have had no opportunity of discussing it. Mrs. Young was a member of a proprietary club subject to rules, and she claimed that she had been wrongly expelled from the club. The Judge who heard the case dismissed it, and refused her the declaration she asked for, viz., that she was still a member of the club. In the event of his decision being upset, he assessed the damages for the expulsion at a farthing. The Court of Appeal granted the declaration asked for, with costs. It had been previously decided in *Baird v. Wells* (2), in the case of a proprietary club in which members have no right of property, that a member who has been expelled by a committee, though the proceedings were irregular, cannot obtain relief by way of injunction, but will be left to obtain it in damages. The decision in *Young v. Ladies' Imperial Club* (1) seems to throw some doubt on *Baird v. Wells* (2); but in my opinion it cannot have overruled the law as laid down in *Forbes v. Eden* (3) and the *Free Church of Scotland v. Overtoun* (4). In addition, it was a case of expulsion from a club, and the plaintiff was deprived of her use and enjoyment of the club; and nothing of that kind has happened in the present case. I am therefore of opinion that *Young v. Ladies' Imperial Club* (1) is not a decisive authority for the plaintiff in this case; but lest I be wrong in that opinion, as I have heard all the evidence and arguments, and in order to save the costs of any further trial, I will now consider the objections to the rules and proceedings of the club urged by the plaintiffs.

[His Lordship held that the proposed alterations had been validly adopted by the club, and proceeded:—]

There are then only two questions left to be decided: 1. Was the old rule 37 legally repealed at the meeting of 8th July, 1922? 2. Apart from the rules altogether, is the rule permitting the playing of golf on Sundays illegal and ultra vires this club or any such club?

On the first question I hold on the evidence that notice of the proposed change—to wit, the repeal of all the old rules, including rule 37, save those expressly re-enacted, which did not include rule 37—was given by the notice convening the meeting of

(1) [1920] 2 K. B. 523.

(2) 44 Ch. D. 661.

(3) 1 H. L. Sc. App. 568.

(4) [1904] A. C. 515.

8th July, 1922, which enclosed the draft new rules. Mr. Pyper and Dr. Lowe admit that if they had read the draft new rules they would have known that this was intended. Mr. Pyper and the member who spoke to him both knew this before the meeting was held. Those members who do not read the proposed change cannot complain of not having received notice of it when they make such an admission. That meeting had therefore power to repeal rule 37 under old rule 24. Mr. Pyper objected to the repeal, and proposed that rule 37 be still incorporated in the new rules, and the motion was rejected by a majority; and the majority at this meeting decided that old rule 37 should not continue to be a rule of the club, and should be repealed. In substance and in fact this amounted to a repeal of rule 37. It might have been more strictly correct if, after the new rules had been duly passed, a motion had been carried that all the old rules of the club be repealed, or that the old rule 37 be repealed; but in substance what was done was equivalent to the passing of such a resolution. The proceedings of these voluntary associations, if bona fide and intra vires, are not to be criticized as closely as if one were dealing with a demurrer. It is further contended that the repeal of rule 37 could only be carried by a majority of two-thirds of those present and voting at the meeting. The old rule 24 means that if notice of the proposed change is given in accordance with that rule, the rules of the club may be repealed or altered or new rules made at a general meeting. If there is not unanimity at the general meeting, the repeal, alteration, or new rule must be carried by a majority unless the rest of the rules make any other provision. Rule 37 only applies to future motions, 1, to open the bar or billiard-room on Sundays, or, 2, to open the links for play on Sundays, or, 3, to alter rule 35; and provides that such motions shall not be passed unless by a majority of two-thirds. No such motion was before the meeting of 8th July, 1922. There is no provision in rule 37 or in any of the other old rules that a motion to repeal or alter rule 37 must be passed by a two-thirds majority. Unfortunately the framers of that rule did not insert in that rule after the words "rule 35" the words "or this rule." It is contended that this was the intention of those who passed it; but I cannot so construe rule 37 unless I add to that rule some such words. This rule duly passed is binding on all the members of the club, whether present at the meeting or not. It can only bind them to what it actually says in plain terms. No doubt the result is that the protection intended for rule 36 has turned out illusory, but that cannot affect the proper construction of rule 37. I am therefore compelled to hold that the old rule 37 was validly repealed at the meeting of 8th July, 1922, and the suggested rules as amended were duly passed at that meeting, and were the only rules of the club binding on the members on the 5th August and 26th of August, 1922. If this is correct, the subsequent proceedings are regular, except the rejection of

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Mr. Pyper's motion to add the old rule 37 to the new rule 32 at the meeting of 5th August, 1922. No relief is claimed in this action in respect of the refusal to entertain that motion. Rule 37 having been repealed, and proxy voting having been authorized by new rule 24, the motion proposed at the meeting on 26th August, 1922, permitting the playing of golf on the links on Sundays, was passed, and is now a subsisting rule of the club.

Is, then, the making of this rule permitting the playing of golf on Sundays ultra vires the club, because it is contrary to the provisions of the statute of 7 Wm. 3 (Ir.), c. 17, sect. 3? It is sufficient to say that if the playing of golf on Sundays, or the permitting or sanctioning of the playing of golf on Sundays, is a criminal offence, this is not the proper Court to determine that question. The criminal Courts are the proper forum where such questions should be tried before a Judge and jury—the constitutional tribunal. The existence of those Courts and that remedy has always been held a sufficient ground for the Chancery Court to refuse a declaration or an injunction to restrain such alleged criminal acts where no damage to property is proved or threatened. I am fortified in this conclusion by the words of Turner L.J., already quoted in this judgment, and by what he stated to the same effect in the *Attorney-General v. Sheffield Gas Consumers' Co.* (1): "It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in a criminal case, that this Court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this Court must rest." To decide otherwise would, in the words of Lord Langdale, be to set in motion once more the criminal jurisdiction of the Star Chamber. This Court is only entitled to deal with this action in accordance with its view of the law and facts, and is not entitled to form or express any opinion on the wisdom or propriety, theological or otherwise, of the rule passed on 26th August, 1922.

Accordingly this action must be dismissed; and I order that judgment be entered herein for the defendants with costs.

Solicitor for the plaintiffs: *Samuel Cunningham.*

Solicitors for the defendants: *Macaulay, O'Neill, & Martin.*

J. M'C.

BERNARD HUGHES, LIMITED, v. HUGHES, DICKSON, &
Co., LIMITED (1).
(1923. No. 35.)

Appeal.
(*N. I.*)

1923.

July 2.

Landlord and tenant—Covenant for renewal or agreement to negotiate for new lease.

Lessees entered into possession of certain premises under a lease for a term of twenty-five years, with a covenant to give the lessees a further lease for the remainder of the lessors' term on sending a notice in writing to that effect to the lessors at least twelve months previous to the end of the term. The lease also contained a further covenant entitling the lessees to take a lease of certain other premises should they elect to do so within six months of the execution of the original lease. They did so elect, and entered into possession of these latter premises subject to a precisely similar covenant for the extension of the lease.

Held, affirming Wilson J., that the lessees were entitled to new leases for the residue of the terms of the lessors in the premises.

APPEAL from the judgment of Wilson J.

ORIGINATING SUMMONS to determine, 1, whether upon the true construction of the covenants contained in an indenture of lease of 23rd September, 1904, the plaintiffs, Bernard Hughes, Ltd., were bound to execute to the defendants, Hughes, Dickson, & Co., Ltd., a lease of the premises, the subject-matter of the said indenture of lease, for the remainder of the term of the plaintiffs in said premises upon receiving written notice from the defendants. 2, In the event of the Court holding that the said plaintiffs were so bound, upon what terms and subject to what conditions the lease of said premises shall be executed?

The summons contained similar questions in reference to the construction of an indenture of lease of September 7th, 1905.

By indenture of lease dated September 23rd, 1904, certain flour-mill premises in Divis Street, Belfast, were demised by the plaintiffs to the defendants for a term of twenty-five years from November 1st, 1904, subject to the yearly rent of £300, and to the covenants and conditions therein contained, and particularly to a covenant on the part of the lessors which was in the following terms:—"And in case the lessees require the lessors to do so, the lessors hereby covenant to execute to the lessees, their executors, administrators, and assigns a lease of said premises hereby demised for the remainder of the lessors' term and interest on receiving a notice in writing to that effect at least twelve months previously to the end of the term hereby granted."

The lease contained a further covenant "that the lessees, their executors, administrators, or assigns shall be at liberty at any time within six months from the execution of these presents to

(1) In the Court of Appeal, before MOORE and ANDREWS L.JJ.

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elect to take the cooling pond at present in the possession of the said lessors, at the rear of the premises hereby demised, at and subject to the yearly rent of £35; and should the said lessees within such period make such election as aforesaid, the lessors hereby agree to execute a separate lease of said cooling pond at the said rent, and on the like terms and conditions as are hereinbefore set out with regard to the premises hereinbefore demised."

In pursuance of the covenant in respect of the cooling pond contained in the lease of September 23rd, 1904, the plaintiffs demised said cooling pond to the defendants by lease dated September 7th, 1905, for the term of twenty-five years from November 1st, 1904, subject to the yearly rent of £35, and to the covenants and conditions therein contained, and particularly to a precisely similar covenant to that contained in the lease of 23rd September, 1904, for an extension or renewal of the lease.

Wilson J. held that the plaintiffs were bound to execute to the defendants leases of the premises, the subject-matter of said indenture of lease of 23rd September, 1904, and 7th September, 1905, respectively, for the remainder of the terms of the plaintiffs in said premises upon receiving written notice to that effect from the defendants, and that the said leases should be executed subject to the annual rents of £300 and £35 respectively, and subject also to such terms, covenants, and conditions as would properly be applicable to leases for the intended term, other than and except the covenant for renewal contained in the said leases of September 23rd, 1904, and September 7th, 1905, respectively.

The plaintiffs appealed to the Court of Appeal of Northern Ireland (1).

S. L. Brown K.C., E. S. Murphy K.C., and M' Sparran, for the plaintiffs :—

This is an invalid agreement for a lease. Both of these leases are void as against the debenture holders, and the decision cannot bind the debenture holders. On the true construction of these covenants the plaintiffs are not bound to execute new leases. These covenants are not covenants for renewal, and are not to be construed as such. The covenants are merely agreements to negotiate for new leases, and are void, as they do not contain any terms for the new leases other than that of their duration. In any case the parties never intended that the new leases should be at the same rents as were reserved by the original leases. The very most the lessees had was a first option for new leases. We ask the Court to construe the documents according to their actual terms, and not to import the word "renewal" into them.

(1) In the Court of Appeal, before MOORE L.J. and ANDREWS L.J.

Megaw K.C. and *Warnock*, for the defendants :—

This is a question of construction. The debenture trust has nothing to do with it. The plaintiffs are bound to fulfil their covenants. The case is concluded by authority, and we rely on *Austin v. Newham* (1). The new leases were to be on the same terms, with the omission of the option for renewal. In *Lewis v. Stephenson* (2) it was held that the words “with option of renewal” were sufficiently definite to enable the terms to be enforced by specific performance. It would be against justice that leases such as these should be held to be mere futilities. That the leases were to be renewed subject to the same terms and the same rent was implied.

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(*N. I.*)
1922.

HUGHES
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ANDREWS L.J., in delivering the judgment of the Court, referred to the summons, the leases of 23rd September, 1904, and 7th September, 1905, and the order of Wilson J. appealed from, and continued :—

Mr. Brown contends on behalf of the plaintiffs that the covenants in question are not options for renewal, but only agreements to negotiate for new leases, and that as these agreements do not contain any terms for the new leases other than that of their duration, it is impossible to give any legal effect to them, and they must be held to be void. He suggests, alternatively, that the parties never intended that the new leases should be at the same rents as were reserved by the original leases; but that it was to be left to the parties to negotiate the new terms, and that at most the lessees had a first option for new leases. We do not accept either contention. These leases were business documents, made between business people. It is quite clear to our minds what the parties were aiming at. The business of the defendants was apparently a new one, and they were anxious that if it proved a success they should have a right to continue to carry it on after the tentative period of twenty-five years named in the leases for a further term, with all the goodwill and other advantages incidental to a continuance of the business in these premises.

We are of opinion that the meaning of the clauses in question is clear, namely, that the new leases should be made on the old terms save as regards their duration, and save also in so far as any of such old terms might possibly be inconsistent with the estate in fee-farm which the landlords possessed, and which they were bound by the covenants to grant to the lessees. There is no ambiguity. If the agreements were contained in documents other than and quite independent of the leases, there can be no doubt that Mr. Brown's argument would be unanswerable, as it would be quite impossible to imply or read into the agreements all the essential terms to enable the Court to decree specific performance. But we consider that where the agreements, as in

(1) [1906] 2 K. B. 167.

(2) 67 L. J. Q. B. 296.

Appeal.
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the present case, are contained in the leases of the premises, the necessary terms as regards subject-matter, rent, etc., can be read into the agreements from the other portions of the leases. They are, in effect, merely covenants for renewal for a different term.

If Mr. Brown be correct in saying that the parties were only agreeing to negotiate for new leases, it is obvious that the lessors could entirely defeat the lessees' rights, and render the covenants nugatory by demanding and insisting upon unreasonable rents.

This is a construction which the Court would only give to the agreements if absolutely coerced to do so. Thus in *Austin v. Newham* (1) Lawrence J. says: "It may be that what the parties contemplated was that during the twelve months they would come to an agreement as to the period for which the lease was to be granted. But whether that is so or not, I think it is an unreasonable construction of the agreement to suppose that the tenant meant to leave it in the power of his lessor to turn him out on the last day of the twelve months."

We therefore approve of the answers given by Wilson J. to the several questions contained in the summons. As the defendants will, however, become entitled to an estate in fee-farm in each of the demised premises, we will add a declaration to our order to the effect that in case of difference between the parties as to what covenants, reservations, and other provisions of the leases to be executed in pursuance of the said order are not repugnant in law to the estate thereby granted, the drafts thereof be settled by the Chief Clerk at chambers.

Solicitors for plaintiffs: *Daniel O'Rorke & Son.*

Solicitors for defendants: *White, M'Millan, & Wheeler.*

J. M'G.

(1) [1906] 2 K. B. 167.

SIR J. B. JOHNSTON'S ESTATE.

(E.C. 8230.)

L. C.
Wylie J.
1923.

March 2.

Land Purchase Acts—Redemption of rent—Variable rent—Non-publication of corn averages—Impossibility to determine the amount of variation—Resumption of publication of corn averages—Tithe Rentcharge (Ireland) Act, 1900 (63 & 64 Vict. c. 58), ss. 2 and 3—Irish Land Act, 1903 (3 Ed. 7, c. 37), s. 90.

Section 90 of the Irish Land Act, 1903 (3 Ed. 7, c. 37), enacts that:—Where, by reason solely of the non-publication of the average prices of produce in the "Dublin Gazette," it has become impossible in the absence of other provision to determine the amount by which any variable rent, calculated upon an average of prices, should be varied, sections 2 and 3 of the Tithe Rentcharge (Ireland) Act, 1900, shall apply as from the commencement of this Act in the case of such variable rents, and the words "tithe rentcharge" in the said sections shall be deemed to include any variable rent as aforesaid.

Held, that the section applies notwithstanding that publication of prices has subsequently been resumed.

MOTION by the vendor to fix the redemption price of a head-rent of £35 2s., subject to variation under the Church Temporalities Acts, payable by the vendor in respect of the lands sold in this matter. On the 19th May, 1922, a consent was entered into by the vendor and the owner of the rent to redeem the rent for £666 18s.; but the fact that the rent was variable was not then known to the vendor, the lease by which same was reserved not being forthcoming, and not having been registered. The vendor now claimed that under the Tithe Rentcharge (Ireland) Act, 1900, the rent became subject to a reduction of 20·7 per cent., which would bring it to £27 16s. 8d., payable from 1st November, 1900, and a further reduction of 18·1 per cent. from 1st November, 1915, thus further reducing the varied rent to £22 15s. The owner of the rent contended that sect. 90 of the Irish Land Act, 1903, which by reference incorporates sects. 2 and 3 of the Tithe Rentcharge Act, 1900, did not apply, inasmuch as the publication of average prices in the "Dublin Gazette" had been resumed.

Meredith K.C., for the vendor.

Russell, for the owner of the rent:—

Section 90 of the Act of 1903 was passed to meet a particular contingency, "where by reason solely of the non-publication," etc., and has no application here, for publication was resumed in 1899, and has continued ever since. Consequently the ordinary method for ascertaining the rent under the Church Temporalities Acts is available and proper. The vendor could have had the rent ascertained in 1912 and in 1919; he has now lost his opportunity till 1926. This particular point has never been decided;

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but my contention was practically admitted by Palles C.B. in *Denny v. Wright* (1). See also the judgment of Ross J. in *Hillhouse v. Tyndall* (2). In *Carson v. Jameson* (3), Mr. W. H. Boyd, counsel for the plaintiff, made the same point as I make now, and Madden J. (though holding that the rent was not variable) commented with approval on his argument. See also the statement in the preliminary note on fee-farm grants in "Irish Forms and Precedents," at p. 93. I submit that the words at the end of sect. 90 are governed by the opening words.

Meredith K.C., in reply :—

The proposition now suggested by Mr. Russell was made in the first edition of Cherry's Land Acts, but was omitted in subsequent editions. I contend that after the passing of the Act of 1903 no variation was possible save in accordance with the provisions of sect. 90. *Hillhouse v. Tyndall* (2) is an authority in my favour. Once the machinery of the Tithe Rent-charge Act comes into operation it goes on for ever. Subsequent publication of average prices in the Gazette is immaterial.

WYLIE J. :—

This is an interesting point. I shall attempt to construe the section without reference to the decided cases. [His Lordship read sect. 90 of the Irish Land Act, 1903.] Are the opening words a mere recital of facts, making the section apply to all variable rents, or do they govern the entire section and limit its operation? I think that the introductory phrase expresses the reason why the section was passed; but that the actual operative words are those at the end. Once the impossibility to vary arises, the rent comes within the provisions of the Tithe Rent-charge Act, and remains within those provisions for all time. I hold that Mr. Meredith's contention is right, and that this rent is a variable rent, subject to the provisions of the Tithe Rent-charge (Ireland) Act, 1900.

Solicitor for the vendor : *N. L. Holland.*

Solicitor for the owner of the rent : *E. V. Hamilton.*

T. C. T.

(1) [1906] 2 I. R. 465, at p. 467.

(2) [1908] 1 I. R. 446.

(3) [1908] 2 I. R. 308.

LORD CLONCURRY v. LAFFAN AND OTHERS.

(1923. No. 256.)

M. R.
(*I. F. S.*)
1923.

*Vendor and Purchaser—Specific Performance—Memorandum in writing—
Signature of agent lawfully authorised—Statute of Frauds (7 Wm. 3
(Ir.), c. 12, s. 2).*

July 26.

B., the plaintiff's agent, agreed verbally with R. to sell to R. certain freehold lands for the sum of £10,000. No formal agreement was entered into, but R. entrusted to his solicitor the carrying out of the contract. On the day this agreement was made the vendor's solicitor wrote to the purchaser's solicitor: "B. informs us that he has agreed with R. for the sale to him of his holding at — in fee-simple for the sum of £10,000. Under these circumstances we think it would be possible to reasonably limit the title." On the next day purchaser's solicitor, in acknowledging the letter, proceeded: "The simple agreement arrived at herein appears in the first part of your letter, and I suggest that we can dispense with any further agreement."

Held, that this letter was a note or memorandum signed by R.'s agent, lawfully authorised, sufficient to satisfy the Statute of Frauds.

The plaintiff, Lord Cloncurry, was owner in fee of certain lands of Farnane and Ahacore, situate in the county of Limerick. Through his agent, Mr. Barrington, a verbal agreement was entered into with Mr. Patrick Ryan for the sale to him of the lands for £10,000. The contract was made at an interview at which Mr. Barrington, Mr. Patrick Ryan, and his solicitor, Mr. O'Brien Moran, were present. After the agreement was made, Mr. Barrington told Mr. Patrick Ryan in the presence of Mr. O'Brien Moran that Messrs. White & White were Lord Cloncurry's solicitors, and that they would carry out the matter for him. Mr. Patrick Ryan committed the matter for completion to Mr. O'Brien Moran. On the same day Mr. Barrington wrote to Mr. O'Brien Moran accepting Mr. Patrick Ryan's offer. Messrs. White & White then wrote to Mr. O'Brien Moran, stating, *inter alia*: "Mr. Barrington, Lord Cloncurry's agent, informs us that he has agreed with Mr. Patrick Ryan for the sale to him of his holding at Farnane and Ahacore in fee-simple, free from all superior interests, for £10,000," and "under these circumstances we think it would be possible to reasonably limit the title." On the next day Mr. O'Brien Moran wrote to Messrs. White & White, stating "the simple agreement arrived at herein appears in the first part of your letter, and I suggest that we can dispense with any further agreement."

The plaintiff now sued the defendants, who were administratrix, co-heiress, and co-heir respectively of Patrick Ryan, for specific performance of the contract, which they had refused to carry out.

- M. R.* *Leonard K.C., Overend K.C., and Grove-White,* for the
(I. F. S.) plaintiff.
1923. *Arthur Meredith K.C. and Bartley,* for defendant Johanna
 CLONCURRY Laffan, administratrix of Patrick Ryan, deceased.
- v. *S. L. Brown K.C., Herbert Wilson K.C., and Phelps,* for
 LAFFAN. defendant Mary Agnes Ryan, co-heiress of Patrick Ryan,
 deceased.
- Poole,* for defendant John Martin O'Connor, co-heir of
 Patrick Ryan, deceased.

O'CONNOR M.R. :—

This is an action for the specific performance of a contract for the sale of real estate. The plaintiff is the vendor, and the defendants are the administratrix of Patrick Ryan, deceased, with whom the contract was entered into, and his co-heir and co-heiress. The purchase-money agreed upon was £10,000. There are only two matters in controversy : 1. The contract with Patrick Ryan was a verbal one, and the Statute of Frauds has been pleaded as a defence; but the plaintiff avers that there is a sufficient note or memorandum of the contract signed by the agent of the purchaser. The authority of the agent to sign the memorandum is denied by the defendants. 2. The contract is alleged by the defendants to have been conditional, and they say that the condition was not performed. Other defences were raised by the pleadings, but they were abandoned at the Bar. I will first deal with the Statute of Frauds.

The facts so far as material are these: the plaintiff, Lord Cloncurry, is the owner in fee of the lands in question, and they were held from him by Patrick Ryan as tenant from year to year. Negotiations had for some time been going on between these parties for the sale by Lord Cloncurry of the fee-simple to Patrick Ryan. Mr. J. B. Barrington was Lord Cloncurry's land agent, and it was through him that the negotiations had taken place. This gentleman had authority from Lord Cloncurry to enter into a contract for the sale of the lands to Patrick Ryan for £10,000. In these circumstances Mr. Barrington, Mr. Patrick Ryan, and Mr. O'Brien Moran, who was solicitor for the latter, met together on the 19th January, 1921, at the office of either Mr. Barrington or Mr. O'Brien Moran in Limerick. It is not quite certain in which office they met, but that is immaterial. The point is that the three persons met for the purpose of concluding a contract.

On that occasion a contract was entered into between Mr. Barrington, acting for Lord Cloncurry, and Mr. Patrick Ryan, in the presence of Mr. O'Brien Moran, his solicitor, for the sale of the lands. As soon as the agreement was made, Mr. Barrington, in the presence of Mr. Patrick Ryan, told Mr. O'Brien Moran that Messrs. White & White, of Dublin, were Lord Cloncurry's

solicitors, and that they would carry out the matter for him. The meaning of that was that Messrs. White & White were to act as solicitors for the vendor in the matter, and Mr. O'Brien Moran was to act as solicitor for the purchaser. The parties then separated. I find as a fact from the evidence that on that occasion Mr. Patrick Ryan as purchaser committed the matter for completion to Mr. O'Brien Moran, and gave him a general authority to do all that was necessary for getting a good title to the lands and having them conveyed to him. The next step was a letter written by Mr. Barrington to Mr. O'Brien Moran on the same day. It is as follows:—

“Cloncurry Estate, Farnane and Ahacore.

“19 January, 1921.

“Dear Sir,—With reference to our interview to-day, I now accept on behalf of Lord Cloncurry your offer to purchase in fee-simple, free of all superior interests, on behalf of Mr. Patrick Ryan, his holding at Farnane and Ahacore for the sum of £10,000 cash. I shall put Lord Cloncurry's solicitors into communication with you at once.”

One would think from that letter that the interview I have mentioned ended only in an offer by Mr. Patrick Ryan, and that the offer was for the first time accepted by the letter; but in fact the contract had been made at the interview. I think that the only object of the letter was to put on record a statement of the terms. This, however, is not important. The next step was a letter from Messrs. White & White to Mr. O'Brien Moran, dated 21st January, 1921. I will read it:—

“Dear Sir,—Mr. J. B. Barrington, Lord Cloncurry's agent, informs us that he has agreed with Mr. Patrick Ryan for the sale to him of his holding at Farnane and Ahacore in fee-simple, free from all superior interests, for £10,000.

“Lord Cloncurry has sold part of his Limerick estate, comprising the lands of Brittas, to the Estates Commissioners; and under these circumstances we think it would be possible to reasonably limit the title. The present Lord Cloncurry holds under a settlement dated 19th January, 1867, and we will give you a copy of this document, together with a copy of the original conveyance in fee to his predecessor. Lord Cloncurry's title was fully investigated in the year 1874, on the occasion of a mortgage for £25,000 to the trustees of Maynooth College.

“We enclose herewith a copy of the Rulings on Title in the Land Commission matter. The entire purchase-money of the present matter will go in reduction of the mortgage to the trustees of Maynooth College. We would be glad to hear from you, when we will prepare an agreement on the lines indicated for signature by your client. We have written to the trustees of Maynooth College for their consent to the sale.—Yours faithfully.”

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The purpose of this letter is quite obvious. Messrs. White and White saw that the contract entered into with Lord Cloncurry was an open one, and that he might be put to very great expense in making title unless there was an agreement to limit the investigations into it. He accordingly asked Mr. O'Brien Moran whether it would be possible reasonably to limit the title.

On the next day Mr. O'Brien Moran wrote to Mr. Barrington, acknowledging his letter of the 19th January, and telling him that he had had a communication from Messrs. White & White; and on the same day, the 22nd January, he wrote the following letter to Messrs. White & White, and as it is in this letter that the acknowledgment of the contract on which the plaintiff relies is to be found, it requires attention. This is the letter:—

“Dear Sirs,—I am in receipt of your favour of the 21st inst., with enclosure sent therewith, and which I have duly noted.

“The simple agreement arrived at herein appears in the first part of your letter, and I suggest that we can dispense with any further agreement, as, so far as I am concerned, if you furnish me with your abstract of title, showing a fee-simple title free from all superior interests, provided I am satisfied with same, I will not insist on any requisitions, which can be dispensed with, and which would entail an unnecessarily exhaustive title.

“I presume the trustees of Maynooth College will join in any release necessary?

“If you desire, however, send me on draft of the agreement you propose, and I will have same signed by my client, subject to any amendments which I may consider necessary.—Yours faithfully,

“H. O'BRIEN MORAN.

“To Messrs. White & White.”

Now, the important part of this letter is the statement, “The simple agreement arrived at herein appears in the first part of your letter.” This is as plain an acknowledgment as could well be made of the contract. That is not denied. The only point made is that Mr. O'Brien Moran was not lawfully authorised to make it. This is the question for decision. In my opinion the writing of the letter and every part of it, and the placing of his signature to it, came within the general scope of the authority conferred by Mr. Patrick Ryan on Mr. O'Brien Moran. He had entrusted to him as a solicitor the carrying out of a contract for the purchase of lands. That involved an authority to do everything that was necessary and proper for the protection of his interests; and when Messrs. White & White suggested that a limitation should be put on the investigation of the title, it was right for Mr. O'Brien Moran to state the contract under which his client was buying: that that contract was an open contract, and that he was not bound to submit to any special limitation being put on the investigation of the title. This was in substance his letter. It is for this reason I say that he was lawfully

authorised by his client to make the statement of the contract and to sign it, and that the letter is a memorandum sufficient to satisfy the Statute of Frauds.

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This has been vigorously contested by the defendants' counsel, and in support of their argument they have relied on the case of *Smith v. Webster* (1). In order to arrive at a clear understanding about this case it is necessary to know exactly the facts. The plaintiffs, Smith and Allen, entered into a verbal agreement with the defendant for the purchase of certain premises for the sum of £950. On the next day the defendant called on his solicitors and informed them that he had entered into a verbal arrangement for the sale of the premises at the price mentioned, and instructed them to prepare an agreement. This was the sole instruction, and on this fact the case hinged. The solicitors prepared a draft of a formal contract, and forwarded it to the plaintiff's solicitor, accompanied by the following letter:—

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"Dear Sir,—Mr. W. Webster (the defendant), of the Golden Lion, Worksop, has been with us to-day, and he states that he had arranged with your client, Mr. Allen (the plaintiff), for the sale to the latter of the Golden Lion for £950. We therefore send herewith draft contract for your approval and perusal."

The draft contract was shortly afterwards returned by the plaintiff's solicitor to the defendant's solicitors, with some alterations therein. The defendant's solicitors sent him the draft contract so altered, and he refused to sign it. It is unnecessary to state his reasons for so refusing. The plaintiffs filed a bill for specific performance, and the defendant pleaded the Statute of Frauds. The point involved was whether the defendant's solicitor was an agent lawfully authorised to sign a memorandum of the agreement on behalf of the defendant. The action was tried by Malins V.-C., who, notwithstanding the evidence that the only instructions the defendant's solicitors got was to prepare a formal contract, most unaccountably drew the inference that they had instructions to do all things necessary to carry the contract into effect. If such were the instructions, that would have involved authority to state under his hand what the agreement was. The Vice-Chancellor gave judgment for the plaintiff, holding that the letter of the defendant's solicitors which accompanied the draft contract sent for approval was a memorandum of the contract entered into, signed by agents of the defendant thereunto lawfully authorised.

An appeal was taken, which was heard by James L.J., Baggalay L.J., and Lush J. James L.J. in his judgment said: "In this case there is no such contract signed by the defendant himself. He goes to his solicitor, and the only authority he gives his solicitor is to prepare a formal document; he gives him no authority to do anything more." There he takes an entirely different, and, as I think, the only reasonable view of the evidence

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Baggalay L.J. in his judgment proceeded on different grounds. He thought that there had not been any binding contract at all between the parties, and that the original contract had been only conditional on a formal contract being signed. That is an element with which we are not concerned in the present case, and I need not further deal with this judgment; but Lush J. went on the same lines as James L.J. He said: "Now, the authority to the solicitors here was not to write a letter which should contain the terms of the contract, but merely to prepare a formal draft contract to be sent to the other side for perusal and approval, and when perused and approved to be signed by the parties themselves. This is all the authority which the solicitors had." The decision of Malins V.-C. was reversed. How different is that from the present case. Here there are no instructions to prepare a formal contract to take the place of the verbal contract. The verbal contract was complete, and the solicitors for both parties were brought in to carry the contract through. That was to be done by the solicitor for the purchaser calling on the solicitor for the vendor to furnish an abstract of title. The date at which the abstract should commence, the documents to be produced for vouching, the searches to be made, the parties to join in the conveyance, and other matters would depend on the contract entered into, and it was absolutely necessary for the respective solicitors to determine as between themselves what in fact the contract was—a necessity which involved an authority by the purchaser to his solicitors to affirm the contract in writing, as solicitors in the ordinary course of their business carry on their communications in writing. The signature was within the scope of their authority.

I must go back for a few moments to the judgment of James L.J., to which I have already referred, as I only dealt with the part which concerned the question whether the solicitors for the defendant had authority to sign the memorandum; but the Lord Justice was of opinion that, even if the solicitors had authority, the letter relied on would not have been a memorandum of the contract within the meaning of the Statute of Frauds. In his opinion it would have been a mere communication of a fact, and the signature would not make it a binding memorandum, not being affixed *eo intuitu*. In this proposition he is not supported by authority. Indeed, the authorities are at variance with it. I refer to *Jones v. The Victoria Graving Dock Co.* (1). In this the plaintiff brought an action for breach of contract by the company. One of the defences raised was the Statute of Frauds, but it was proved that the chairman of the company signed minutes which contained a statement of the contract. This was relied upon by the plaintiff as a sufficient signature, and the defendants contended that it was not. The contention is set forth in the judgment of Lush J. in these words: "First, it

was contended that the signature of the chairman to the minutes was put in order to verify the proceedings of the board, in obedience to the Companies Act, 1862, sect. 1, and not in order to attest or verify the contract, and that, as the signature was put *alio intuitu*, it cannot be available for the purpose of satisfying the Statute of Frauds. We think there is more ingenuity than force in this argument. The signature required by sect. 4 is not of the substance of the contract; it is a matter of procedure only—*Leroux v. Brown* (1)—and is required as evidence of the contract. To prevent frauds and perjuries, the Act will not allow any other kind of proof than the writing itself (if it be in writing), or a written admission that the contract was made, and that it was signed in either case by the party to be charged. But, so that this kind of evidence is given, it matters not that the memorandum was not made at the time, or for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract.” Now, this is a pronouncement on a material question in the action, and, although made by a Judge of first instance, must prevail over the observation of James L.J. in *Smith v. Webster* (2), which was unnecessary for his decision, and must be regarded only as an obiter dictum. But the question came up again in *John Griffiths Cycle Corporation, Limited, v. Humber & Co., Limited* (3); and there, in the judgment of the Court of Appeal, given by Smith L.J., there is this statement, at p. 418: “It is also undoubted law that a signature to a document which contains the terms of a contract is available for the purpose of satisfying sect. 4 of the statute, though put *alio intuitu*, and not in order to attest or verify the contract.” The same question came up in *Daniels v. Trefusis* (4). In that case the defendant Trefusis agreed with one Girdleston to purchase from him certain premises at the price of £700. Girdleston was acting for Daniels, the plaintiff in the action, who was an undisclosed principal, but afterwards Girdleston set up the case that he had agreed to buy the property from Daniels for £600, and that in the transaction with Trefusis he was acting on his own account, and sub-selling to him at an increased price. This led to an action brought by Girdleston against Daniels for specific performance of an agreement by Daniels to sell the property to Girdleston for £600. In this action Daniels’ solicitor, for the purpose of getting evidence that there was no such contract between Girdleston and Daniels as Girdleston alleged, communicated with Trefusis’s solicitors for the purpose of getting a proof of the evidence which Trefusis could give, and the solicitor of the latter on his behalf furnished certain statements in writing, which embraced a statement of the contract between him and Girdleston. The action brought by Girdleston against Daniels was dismissed. Trefusis afterwards refused to complete his contract with Girdleston,

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(1) 12 C. B. 801.

(2) 3 Ch. Div. 49.

(3) [1899] 2 Q. B. 414.

(4) [1914] 1 Ch. 788.

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acting as agent for Daniels, and the latter brought an action for specific performance against Trefusis—the action which is the subject-matter of the reported case. Trefusis pleaded the Statute of Frauds, and this involved two points of contention: first, whether Trefusis's solicitors, in giving the proofs to Daniels' solicitors in the action of *Girdleston v. Daniels* (1), were not really acting as the agents of Daniels; and, second, whether the authority of Trefusis's solicitors extended to signing a note or memorandum of the contract on his behalf. On the first question Sargent J. decided that the solicitors were acting as agents for Trefusis; but this is not of importance for the matter in hand. The second question is the material one. On this Sargent J. said: "The second objection [that is, the defendant's] is more formidable, and is supported at first sight by the well-known case of *Smith v. Webster* (2). But when that case is carefully examined, both on its own facts and in the light of the two subsequent cases of *Jones v. Victoria Graving Dock Co.* (3) and *John Griffiths Cycle Corporation Co. v. Humber & Co.* (4) (a case which was reversed in the House of Lords on entirely different grounds), it becomes apparent that the present case is not within it. *Smith v. Webster* (2) really decided that the authority of a solicitor to prepare a draft contract did not include, and indeed was inconsistent with, an authority to state in a binding form, and so as to constitute a contract, the rough heads of information which had been given by the client to the solicitor as material on which to draw the formal contract. But here the authority was not a general authority at all, but an authority to forward to the plaintiff's advisers certain particular documents. And, although the defendant may not have been contemplating that those documents would form a note or memorandum of the contract sufficient to satisfy the Statute of Frauds (indeed, nothing could have been further from his thoughts), that did not, in my judgment, invalidate the authority to forward the documents or prevent all these legal consequences flowing from the forwarding which would undoubtedly have flowed from it had the defendant forwarded the statements himself and signed the letters enclosing them. It seems to me that the unintentional by-product of satisfying the Statute of Frauds may be produced as completely by a note or memorandum signed by an agent of the party as by a note or memorandum signed by the party himself, provided, of course, that the agent had authority to sign the particular note or memorandum." Now I confess that this seems to me to go very far, because it decides that a party making a statement to help another in legal proceedings may find that statement used against himself by the very person for whose assistance it was given. It is, however, a very striking example of the general principle that no matter what the purpose for which a memoran-

(1) Not reported.

(2) 3 Ch. Div. 49.

(3) 2 Q. B. D. 314.

(4) [1899] 2 Q. B. 414.

dum was signed, it may be a memorandum within the Statute of Frauds if signed by the party himself or his agent lawfully authorised.

In consequence of the assertion made by Mr. Wilson, that there is no instance in the books of a memorandum being held sufficient by reason of a general authority, I wish to go back for a moment to the judgment of Sargent J. It will be remembered that I quoted part of his judgment, in which he said: "Here the authority was not a general authority at all, but an authority to forward to the plaintiff's advisers certain particular documents." At first blush that would seem to mean that a general authority would not be sufficient, but that, in my opinion, was not his meaning. He only meant that there was even more than a general authority — a particular authority — which strengthens the position. If he meant anything else, he would stand alone in his opinion. I now come to *North v. Loomes* (1). That was an action for specific performance by the vendor against a purchaser. The plaintiff and defendant verbally agreed for the purchase by the latter of certain premises at the price of £590. The defendant paid £50 by way of deposit, and got a receipt therefor from the plaintiff. The receipt showed what the contract was. The defendant sent the receipt to his solicitor, instructing him that it was the agreement entered into, and that he was to carry it out. At the same time the plaintiff put the completion in the hands of his solicitor, who, seeing that his client had, if the receipt was the agreement, bound himself by an open contract, sent to the defendant's solicitor a draft formal contract. The defendant's solicitor, seeing that his client had obtained an open contract, would not hear of any further contract, and wrote to the plaintiff's solicitor a letter, which he signed, as follows:—"I need not trouble you to send me another contract, as the one which your client has signed is, I think, quite sufficient. As possibly you have not a copy, I am sending you one herewith, and shall be pleased to have the abstract of title as early as possible." The question for decision was whether that letter was a sufficient memorandum signed by the agent of the defendant thereunto lawfully authorised. One must be struck by the close resemblance between that case and the present. The main feature in each case is that after the making of the verbal contract both the vendor and purchaser placed the matter in the hands of their solicitors. It will be seen in a moment that the judgment of Younger J. is strictly applicable to the present case. On the question whether the defendant's solicitor, Mr. Taylor, was an agent lawfully authorised to sign a memorandum of the contract, he said: "It is said, however, that Mr. Taylor had no authority to sign such a letter, so as in effect to conclude a binding contract between the defendant and the plaintiff, and *Smith v. Webster* (2) is relied upon in support of that contention. But, in my opinion,

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that case is easily distinguishable. Mr. Taylor's instructions here were to carry out the contract which his client told him he had already made, and on which he had paid £50 as a deposit. Mr. Taylor, in fact, had the authority which Malin V.-C., in *Smith v. Webster* (1), believed that the solicitor there possessed, and it was because the Court of Appeal found that the solicitor possessed no such authority that they disagreed with the judgment of the Vice-Chancellor." Then, having referred to *Daniels v. Trefusis* (2), he says further: "Mr. Taylor's instructions from the defendant were to complete, not to negotiate, a contract. It was an essential implication that he should, if and when necessary, affirm on behalf of his client the existence and validity on his side of the contract he was so instructed to carry out." That exactly describes the situation in the present case; and as the plea of the Statute of Frauds was held to have failed in *North v. Loomes* (3), I must, on the same reasoning, hold that it fails in the present case.

The second line of defence—viz., that the contract was conditional—may easily be disposed of. The evidence of Mr. Barrington was clear that there was no condition. That evidence was placed beyond question by the letter of Mr. O'Brien Moran, dated 22nd January, 1921, in which he said: "The simple agreement arrived at herein appears in the first part of your letter." The agreement referred to bears out the description of a "simple agreement," without any condition of any sort.

The plaintiff is entitled to a decree for specific performance of the contract.

Solicitors for the plaintiff: *Messrs. White & White.*

Solicitor for the defendant Johanna Laffan: *Mr. O'Brien Moran.*

Solicitors for defendants Mary Agnes Ryan and J. M. O'Connor: *Messrs. Connolly & Co.*

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(1) 3 Ch. Div. 49.

(2) [1914] 1 Ch. 788.

(3) [1919] 1 Ch. 378.

IN THE MATTER OF THE TRUSTS OF THE WILL OF THE RIGHT HON. JENICO WILLIAM JOSEPH VISCOUNT GORMANSTON, DECEASED; AND IN THE MATTER OF THE CHATTELS AND JEWELS SETTLED BY A SETTLEMENT MADE BY THE SAID WILL; AND IN THE MATTER OF AN INDENTURE OF SETTLEMENT DATED OCTOBER 10TH, 1904, AND MADE BETWEEN THE SAID JENICO WILLIAM JOSEPH GORMANSTON OF THE FIRST PART, THE HON. JENICO EDWARD JOSEPH PRESTON OF THE SECOND PART, AND GERALD DEASE AND THOMAS EDWARD PRESTON OF THE THIRD PART; AND IN THE MATTER OF THE SETTLED LAND ACTS, 1882 TO 1890.

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BETWEEN THE RIGHT HON. JENICO EDWARD JOSEPH VISCOUNT GORMANSTON, PLAINTIFF; AND THE RIGHT HON. GEORGINA JANE VISCOUNTESS GORMANSTON, GERALD DEASE, THE HON. JENICO WILLIAM RICHARD PRESTON, AND WILLIAM O'REILLY, DEFENDANTS.

(1923. No. 336.)

Bequest of jewels to devolve as heirlooms—Vesting in tenant in tail attaining twenty-one—Tenant in tail by descent included—Rule against perpetuities.

Under a will jewels the absolute property of the testator were bequeathed to trustees of a settlement previously made, subject to a life interest, upon trust to permit the same to be enjoyed and devolve, with certain freehold hereditaments, under the settlement; and, subject to the life interest, "to devolve and be enjoyed as heirlooms with the testator's real estate, but so that the same shall not vest in any person becoming tenant in tail male or in tail unless he shall attain the age of twenty-one, but on his death under that age shall devolve as if they formed part of the said estates."

Held, that inasmuch as the limitation of the jewels to tenants in tail in succession, with a gift over in the event of a tenant in tail dying under twenty-one years, included the whole class of tenants in tail on whom the lands were settled, and therefore included tenants in tail by descent, the bequest was invalid as contravening the rule against perpetuities, and that the jewels passed to the residuary legatee absolutely.

Christie v. Gosling (L.R. 1 H.L. 279) distinguished.

ORIGINATING SUMMONS for the purpose of determining the ownership of certain jewels which were the absolute property of the late Viscount Gormanston, and which were bequeathed by his will to the trustees thereof, to be enjoyed as heirlooms, with certain real estate. At the testator's death this real estate was subject to a settlement dated the 10th October, 1904, under which they stood limited to the late Viscount Gormanston for his life, with remainder to the use of the present Viscount Gormanston for

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his life, with remainder to the use of his first and other sons successively in tail male, with remainder to the testator's second son Richard for life, with remainder to his sons in tail male, with remainder to his third son Hubert for life, with remainder to his sons in tail male, with remainders over.

By the will of the late Viscount Gormanston, dated 14th February, 1907, he appointed his wife Georgina Viscountess Gormanston and Major Gerald Dease his trustees, and he bequeathed to them, *inter alia*, all his family jewels upon trust to permit the said Georgina Viscountess Gormanston to have the possession and use thereof during her life, and subject thereto to permit the same to devolve and be enjoyed as heirlooms with his real estate, but so that the same should not vest in any person becoming tenant in tail male or in tail unless he should attain the age of twenty-one years, but on his death under that age should devolve as if they had formed part of the said estate; and the testator by his said will made the present Viscount Gormanston his residuary devisee and legatee.

The late Viscount Gormanston, the testator, died on the 29th October, 1907, and probate of his will was granted on the 27th November, 1907, to the said Georgina Viscountess Gormanston and Gerald Dease.

The present Viscount Gormanston is married and has four children, viz., the Hon. Jenico William Richard Preston, the Hon. Robert Francis Hubert Preston, the Hon. Stephen Edward Thomas Preston, and the Hon. Eileen Antoinette Mary Preston, who are infants. Georgina Viscountess Gormanston has relinquished her life estate in the jewels.

Oliver Murphy, for the plaintiff :—

The bequest in the will deals only with personalty, and must be construed as so applying, and the possible limitations of the property to persons possibly taking by descent must be extended; and as limitation of personalty can only be by purchase, and not by descent, the restricting clause must be confined to those who take by purchase. Therefore the restriction does not violate the rule against perpetuities, as the persons who take by purchase must come into being in the lifetime of the present Lord Gormanston: *Martella v. Holloway* (1); *Christie v. Gosling* (2).

Phelps, for the defendants.

His Honor the Master of the Rolls, having stated the facts hereinbefore set out, proceeded :—

It is now desirable for family reasons to sell the jewels, and the present Viscount Gormanston claims to be the absolute owner thereof as the testator's residuary legatee, his contention being that the bequest of the jewels as heirlooms, to be enjoyed with the

(1) L. R. 5 H. L. 532.

(2) L. R. 1 H. L. 279.

settled lands in the manner prescribed by the will, is invalid, and that the bequest thereof failed and the jewels passed to him as residuary legatee.

Lord Gormanston is plaintiff in the summons; Georgina Viscountess Gormanston and Gerald Dease, as executors of the will, are defendants. The Hon. Jenico William Richard Preston, as the eldest son of Lord Gormanston and first tenant in tail of the lands under the settlement, is also a defendant; and I have named him to represent the class of tenants in tail. The brothers of the present Lord Gormanston, viz., Richard and Hubert, are also defendants, together with Gerald Dease and Wm. O'Reilly, the trustees of the settlement, so that all parties interested are thus represented.

I may say in the first place, before approaching the question at issue, that although the testator spoke of the real estates as his real estate, they were not, strictly speaking, his own, as all the lands were in settlement, and he was only tenant for life thereof. But it is certain that when he referred to his real estates he meant the lands subject to the settlement I have mentioned.

Now, the point which Lord Gormanston makes is this: He says that the bequest of the jewels to devolve and be enjoyed as heirlooms with his real estates, but so that the same shall not vest in any person becoming tenant in tail male or in tail unless he shall attain the age of twenty-one years, but on his death under that age shall devolve as if they had formed part of the said estates, is invalid, because it offends against the rule against perpetuities, and has therefore failed. This depends on the meaning to be put on "tenant in tail male or in tail." If it means tenant in tail by purchase, the bequest would be valid; but if tenant in tail male or in tail includes all tenants in tail, whether by purchase or by descent, the bequest is invalid, because that would or might have the effect of tying up the property for a longer time than is allowed by the rule against perpetuities. For instance, any one of Lord Gormanston's sons might die under the age of twenty-one years leaving male issue, in which case the jewels would not vest absolutely until some one of such unborn male issue attained twenty-one years of age.

If the trust declared by the will had stopped at the words to "devolve and to be enjoyed as heirlooms with my real estates," possibly no objection could be taken, because the first person becoming tenant in tail—necessarily a tenant in tail by purchase—would become absolute owner of the jewels; but by the superadded words, "but so that the same shall not vest in any person becoming tenant in tail unless he shall attain the age of twenty-one years, but on his death under that age shall devolve as if they had formed part of the said estates," all tenants in tail, whether by purchase or descent, are shown to have been meant by the testator. "Tenant in tail by purchase" is not meant. "Any person becoming tenant in tail" includes all tenants in tail, so that the testator intended to postpone the vesting of the jewels

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until some tenant in tail, no matter how remote, attained the age of twenty-one years. Such is Lord Gormanston's contention.

I confess that, altogether apart from authority, I see no answer to this. Let me now see how the authorities stand. In *Christie v. Gosling* (1) lands were settled by will on the testator's nephew for life, with remainder to his first and other sons in tail, and he bequeathed his personal property on the same trusts as were directed concerning his real estate, or as near thereto as the rules of law and equity would permit, with a proviso that the personal estate should not vest absolutely in any tenant in tail unless such person should attain twenty-one. It is to be observed that this settlement of the personal estate is not in the same terms as those in the case before me. In *Christie v. Gosling* (1) there was no gift over in the event of the tenant in tail dying under twenty-one years, while in the present case there is. This, I think, is a material difference. The question in *Christie v. Gosling* (1) was whether tenant in tail should be construed as tenant in tail by purchase only. It was held by Lord Chelmsford and Lord Cranworth (Lord St. Leonards dissenting) that it was to be so construed. The reasoning was this: that the limitation of the personal estate to the nephew for life, with remainder to his first son in tail, gave the son, who was a tenant in tail by purchase, the whole estate in the personal property, subject to the proviso that he should attain twenty-one, and that the proviso should be read as a mere qualification of the preceding gift, and not as a description of the person who should take the personalty. If the proviso were to be read as a description, that would let in a class embracing any tenant in tail who would attain twenty-one, and so make the limitation void, as contrary to the rule against perpetuities.

I have pointed out that there is no gift over in *Christie v. Gosling* (1), while there is a gift over in the present case. On the death of any tenant in tail the jewels are to devolve as if they had formed part of the real estate—that is, they are to pass to the next tenant in tail who would take the real estate, and who might be a tenant in tail by descent and not by purchase. For instance, the eldest son of Lord Gormanston is the first tenant in tail, and he is tenant in tail by purchase. But he may marry, have issue male, and die in his father's lifetime before he attains twenty-one years; and in like manner such issue male may marry, have issue male, and die before he attains twenty-one years. Each of these tenants in tail on attaining twenty-one years would take under the terms of the gift over if it were possible in law. This gift over shows that the tenant in tail to whom the jewels were absolutely given by the will was not necessarily a tenant in tail by purchase. I cannot read the proviso that the jewels are not to vest unless the tenant in tail attains twenty-one, coupled with the limitation over to tenants in tail in succession, as a mere

qualification of the gift to the first tenant in tail, as was done in *Christie v. Gosling* (1). I am forced to read it as description of the tenant in tail who was intended to take the jewels absolutely, and the description includes the whole class of tenants in tail on whom the lands were settled. This involves a settlement of the jewels in such a way as makes it void under the rule against perpetuities.

I wish further to point to a distinction between *Christie v. Gosling* (1) and the present case. In the former the real estate was settled by the same instrument as that which disposed of the personal estate, and I think that that circumstance aided the construction by which "tenant in tail" was given the meaning of tenant in tail by purchase. But here we have a settlement by will of heirlooms on the same persons as those on whom lands were settled by a previous settlement, under which tenants in tail both by purchase and descent were entitled to take. That distinction was pointed out by Lord Hatherley in *Harrington v. Harrington* (2). At p. 98 he calls attention to the circumstance that in *Christie v. Gosling* (1) the lands were settled by the will which disposed of the chattels, and then he goes on to say: "But this will—in *Harrington v. Harrington* (2)—which refers, not to anything contained in the will itself, but to an old settlement of a long anterior date (more than twenty years before the will itself), and to the limitations which might be created by that settlement, and which speaks of giving chattels, not to those persons who took simply as tenants in tail by purchase, but to persons who for the time being should be persons taking by descent through the operations of the estates tail given to persons under the settlement, is a will of a very different character from the will in *Christie v. Gosling* (1), and therefore that case has no application to the present case."

I think that these observations strongly support the view I have taken, that *Christie v. Gosling* (1) does not govern the case with which I am now dealing.

In my opinion the specific bequest of the jewels failed, and they passed to Lord Gormanston as residuary legatee under the will. I shall so declare.

Solicitors for all the parties: *Beauchamp & Orr.*

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(1) L. R. 1 H. L. 279.

(2) L. R. 5 H. L. 87.

<i>M. R.</i> (<i>I. F. S.</i>) 1923.	IN THE MATTER OF THE ESTATE OF HENRY O'CONNOR, DECEASED; JOSEPH M'DERMOTT, PLAINTIFF; HIS MAJESTY'S ATTORNEY-GENERAL FOR IRELAND AND ALPHONSUS M'DERMOTT, DEFENDANTS. CON- SOLIDATED WITH IN THE MATTER OF THE ESTATE OF MARY O'CONNOR, DECEASED; ALPHONSUS M'DERMOTT, PLAINTIFF; HIS MAJESTY'S ATTORNEY-GENERAL FOR IRELAND AND JOSEPH M'DERMOTT, DEFEN- DANTS. No. 2.
April 18, 19. May 1.	(1920. No. 506.)
<i>Appeal.</i> (<i>I. F. S.</i>) 1923.	(1920. No. 730.)
July 9, 10, 30.	

Fee-farm grant—Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57)—Fixing of judicial rent—Limited owner—Conversion—Land devised in trust for sale—Partial failure of trusts—Intestacy—Real or personal estate.

A judicial rent was fixed by order of the Land Commission in respect of lands held under a fee-farm grant.

Held by the Court of Appeal (affirming O'Connor M.R.), that the fixing of the judicial rent converted the fee-farm estate into a chattel real estate, and that such a conversion could be effected by a limited owner.

H. O'C. by his will devised and bequeathed all his real and personal property not thereby otherwise disposed of to his trustees and executors upon trust that they should sell, call in, and collect the same, and out of the moneys arising thereby, and all other moneys forming part of his estate, pay his funeral and testamentary expenses and debts and the legacies, other than specific legacies thereby bequeathed. He bequeathed pecuniary legacies to a number of charitable institutions, and directed that they should not be paid till after the death of his sister, M. O'C. He bequeathed to her for life the net income of all his residuary real and personal estate, and all investments representing the same. He further devised and bequeathed, after payment of the charitable legacies, the net residue of his property on his sister's death upon trust for such of the charitable institutions named in his will as his trustees should select, and they appointed the residue among certain charitable institutions mentioned in equal shares. H. O'C. died within three months from the date of his will, leaving M. O'C. his sole next-of-kin and heiress-at-law him surviving. M. O'C. by her will gave certain legacies, and devised and bequeathed the residue of her property, real and personal, in equal shares to the charitable institutions named in her brother's will. She also died within three months from the date of her will. In former proceedings it was held that the charitable legacies were rendered void by sect. 16 of the Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97).

Held by the Court of Appeal (affirming O'Connor M.R.), that where real estate is devised upon trust for conversion into personalty to be held upon trusts, which in the result partially fail, the proceeds of the lands sold and land, if any, unsold, so far as the same are applicable to trusts which have failed, both result to the heir as personal estate; and accordingly that the real estate of H. O'C., and also the proceeds of the sale of land previously disposed of by him, which passed to M. O'C. as his heiress-at-law on her death, passed to her personal representative as personal estate.

MOTION ON NOTICE.

John O'Connor, senior, held the lands of Mountlusk under a fee-farm grant, and by his will, dated December 21st, 1888, he bequeathed them to Henry O'Connor for life, with remainder, in the events which happened, to John O'Connor, junior. John O'Connor, senior, died on November 9th, 1893, but before his

death he had served an originating notice under the Redemption of Rent (Ireland) Act, 1891, to redeem the fee-farm rent, and in case the grantors should not signify their consent to such redemption, he applied to the Court to be deemed a present tenant of the holding, and for an order fixing the fair rent to be thereafter paid for the same. By order of the Land Commission, the proceedings were continued in the name of Henry O'Connor, the tenant for life under the will of John O'Connor, deceased; and the grantors not having consented to the redemption of the rent, a fair rent was fixed.

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The testator, Henry O'Connor, died on January 26th, 1920, having made his will on January 19th, 1920, by which he devised and bequeathed his real and personal property not thereby otherwise disposed of to his trustees and executors upon trust that they should call in and collect the same, and out of the moneys arising thereby and all other moneys forming part of his estate pay his funeral and testamentary expenses and debts, and the legacies other than specific legacies thereby bequeathed. He bequeathed certain personal pecuniary legacies, amounting in all to £2,500. He bequeathed twelve pecuniary legacies of £500 each to twelve charitable institutions, and £100 for Masses to be offered up in Ireland for the repose of his soul. He directed that the charitable legacies should not be payable till after the death of his sister, Mary O'Connor, and he bequeathed to her for life the net income of all his real and personal estate, and all investments representing the same. He further devised and bequeathed the net residue of his property on his sister's death, after the payment of charitable legacies, upon trust for such of the charitable institutions as he had previously named in his will as his trustees and executors should select. The testator died within three months from the date of his will, leaving his sister, Mary O'Connor, his sole next-of-kin and heiress-at-law, and his freehold lands devolved upon her as his heiress-at-law, subject to the trust for conversion in his will. Mary O'Connor devised and bequeathed the residue of her property, real and personal, in equal shares to the several institutions named in the will of her brother, Henry O'Connor, and died the day after she made her will.

The parties agreed to treat the notice of motion as an action.

H. Wilson K.C. and *Morgan Byrne*, for executors and trustees of Henry and Mary O'Connor.

MacLoone K.C. and *E. J. Kelly*, for Hugh Mailey, heir-at-law of Mary O'Connor.

Overend K.C. and *Murnaghan*, for Mary Anne Waters, personal representative of John O'Connor.

Jellett K.C. and *Hamilton*, for one of the next-of-kin of Mary and John O'Connor.

Denning K.C. and *Sainsbury*, for Alphonsus M'Dermott.

John O'Byrne, for the Attorney-General.

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O'CONNOR M.R. :—

In this action several questions remain for decision.

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I refer for brevity to the statement of the will of Henry O'Connor, and of the material facts contained in the report of *M'Dermott v. The Attorney-General* (1). Owing to the death of Henry O'Connor within three months from the date of his will, his freehold lands devolved upon Mary O'Connor as his heiress-at-law, subject to the trust for conversion in his will. Likewise, owing to her death within three months from the date of her will, the lands which she derived from Henry O'Connor as his heiress-at-law devolved on her death as if she had died intestate; but the question arises whether the freeholds devolved on her heirs as real estate or passed to her personal representatives as personalty.

I have already decided, as appears from the report referred to, that although Mary O'Connor acquired the lands as heiress-at-law of Henry O'Connor, she took the property as personal estate. This I considered to be the result of the decision in *In re Richerson, Scales v. Heyhoe* (2). No doubt my judgment was reversed by the Court of Appeal, but not, as I understand, because I misinterpreted *In re Richerson* (2), but because I held that she had not an "estate in lands" within the meaning of sect. 16 of 7 & 8 Vict. c. 97. This, of course, raised an entirely different question, because she might have had "an estate in lands"—the widest term known to the law, as Lord Justice Ronan pointed out—but that estate might have been real or personal.

Mr. MacLoone, for one of the co-heirs of Mary O'Connor, did not contest the authority of *In re Richerson* (2), but he said that it only covered a case of a partial failure of the purposes of the conversion. He is right in this, as appears from the judgment of Chitty J., quoted by me in *M'Dermott v. The Attorney-General* (1). The question then is narrowed down to this: was there a total or a partial failure of the trust for conversion in Henry O'Connor's will? It appears to me that there was not a total failure of the trust. The scheme of his will was a conversion of his entire estate, real and personal, into money, so as to make it a mixed fund, out of which his funeral and testamentary expenses, debts, and legacies were to be paid. Even though the charitable legacies failed so far as payable out of lands, the trust for conversion still remained for the purpose of paying the funeral expenses, debts, and non-charitable legacies out of the mixed fund. Again, it must be remembered that even though the charitable legacies failed so far as payable out of lands, they did not fail in toto. They were to be paid out of a mixed fund, consisting in part of proceeds of the sale of land and in part of the proceeds of the sale of personalty. The legacies were a charge on the entire mixed fund. There is no marshalling in

(1) [1922] 1 I.R. 139.

(2) [1892] 1 Ch. 379.

favour of charitable legacies so as to escape the mortmain Acts; but it has always been admitted that a proportionate part thereof is payable, having regard to the rateable values of the real and personal estates, if the legacies are made payable out of both. In order that these rateable values may be ascertained, there is sometimes a valuation made of the real and personal estates, but that is only in case of necessity. But here there is no necessity; there is a paramount trust for conversion for the purpose of creating a mixed fund for payment of funeral expenses, debts, testamentary expenses, and non-charitable legacies.

I desire to call attention to my judgment in *M' Dermott v. The Attorney-General* (1), in which I think I was guilty of an inaccuracy. I there said, when attempting to define the position of Mary O'Connor under the will of Henry O'Connor, "that by discharging all claims upon the lands she could have called for a conveyance of the lands." On consideration, I do not think that this was right. This would be in disregard of the intention of the testator to create a mixed fund, and in derogation of the right of all persons interested in the personal estate to make the real estate liable for its due proportion of the debts, funeral and testamentary expenses, and the non-charitable legacies. It is also to be borne in mind that, apart altogether from the considerations I have referred to, it was the duty of the trustees to convert, because Mary O'Connor was under the will to get the income for her life of a converted fund. She never relieved the trustees from that duty. For these reasons I am of opinion that there was not a total failure of the trust for conversion, and that the present case falls within the decision in *In re Richerson* (2). In so holding I am not acting in any way contrary to the judgment of the Court of Appeal in *M' Dermott v. The Attorney-General* (1), which is binding upon me, and which I unreservedly accept.

The next question arises in this way: John O'Connor, the father of Henry O'Connor, by his will dated 21st December, 1888, devised certain freehold estates to Henry O'Connor for his life, with remainder to his children, with remainder to John O'Connor, junior, a son of the testator. Henry O'Connor entered into possession as tenant for life. He died without leaving issue. John O'Connor, junior, died in his lifetime intestate, leaving Henry O'Connor his heir-at-law. Henry O'Connor sold the lands as tenant for life under the provisions of the Settled Land Act, and the proceeds of sale were invested as prescribed by the Act. It has been contended on behalf of the personal representative of John O'Connor, junior, that the invested moneys were personal estate at the death of Henry. I wholly fail to see any reason in this, having regard to the terms of sect. 22, sub-s. 5, of the Settled Land Act, 1882, which enacts that capital moneys shall for all purposes of disposition, transmission, and devolution be

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considered as land. Mr. Overend argued that as the trusts of the will had determined at the death of Henry, the capital moneys must be taken as they were found in fact, and that the notional character of real estate should not be impressed upon them. But he is met by the language of the Act, and, further, he is, in my opinion, wrong in assuming that the death of Henry was the point of time at which the character of the estate of John O'Connor, junior, was to be ascertained. At his death in Henry's lifetime he was the owner of a vested estate in remainder. The devolution then took place, and at that time the estate was still in settlement, and in my view retained its original character of real estate. I hold that John O'Connor's, junior, estate in the capital moneys devolved upon Henry O'Connor as his heir-at-law.

The next question concerns the lands of Mountlusk, devised by the will of John O'Connor, senior, to Henry O'Connor for life, remainder to his children, remainder to John O'Connor, junior. These lands were held by John O'Connor, senior, in fee-farm. During his life he served an originating notice on the owners of the fee-farm rent for redemption thereof, or in the alternative to fix a fair rent in lieu of redemption, as provided for by the Redemption of Rent Act, 1891, sect. 1. He died before this notice came on for hearing by the Land Commission. After his death, Henry O'Connor having gone into possession as tenant for life, continued the proceedings on the originating notice, and got a fair rent fixed. It is contended that this worked a conversion of the fee-farm grant into a tenancy from year to year, and that the lands thus became personal estate. The first point to be decided is by whom the alleged conversion was made. Mr. Overend, for the personal representative of John O'Connor, junior, in order to get over the difficulty which was presented to his mind by an alleged conversion by a limited owner,—viz., Henry—maintained that the conversion was worked by the service of the originating notice by John, senior. He said that as the proceeding was started by him, the order fixing the fair rent related back. But this argument does not bear examination. There cannot be conversion without an express or implied intention to convert. None such can be imputed to John, senior, for the simple reason that the notice was to redeem or fix a fair rent. The result of one alternative would be to acquire the fee. How then can it be said that he intended to convert the land into personalty? The intention to convert can only, if at all, be imputed to Henry, who in fact got the fair rent fixed; and the questions then remain:—1. Can a limited owner change the character of an estate? 2. Is there in fact a conversion of a fee-farm estate into a chattel real estate by fixing a fair rent on lands held under a fee-farm grant? I will take the latter question first. On this there has been so much diversity of opinion that I cannot fall back upon authority. If I follow one decision, I will find

myself at variance with another. On one side I have *M'Evoy v. M'Evoy* (1), decided in 1897, in which the tenant who fixed a fair rent held under a freehold lease. Sir Andrew Porter held that the freehold was converted into personal estate. I have also *Temple v. Lyons* (2), decided in 1912, in which the tenant, a fee-farm grantee, fixed a fair rent, and Barton J. held that there was a similar conversion. On the other side, then, is *In re Rutledge* (3), in which Monroe J. held that notwithstanding the fixing of a fair rent, the tenant in fee-farm remained the owner of the first estate of inheritance, and as such continued to be liable to tithe rent-charge. This was followed in 1901 in *The Irish Land Commission v. Magorian* (4), in which the King's Bench Division, consisting of Madden, Boyd, and Kenny JJ., decided that a conversion was not wrought by the fixing of a fair rent, and that a fee-farm grantee who had a fair rent fixed still remained the owner of the first estate of inheritance. There are other judgments to be found in which the dicta of judges may be quoted on one side or the other. The result is therefore perplexity, and I can find no way out of it if I try to base my present judgment on authority. Madden J., in *The Irish Land Commission v. Magorian* (4), relied strongly on the necessity there was for uniformity of decision in cases in which the title to property depends; but when I find no uniformity—when I find diversity and contradiction—I have nothing to fall back upon but legal principles. I have two principles in mind. The first is: if the fixing of a fair rent only creates conditions which may exist side by side with a fee-farm estate, that estate may continue to exist. The second principle is: if the fixing of a fair rent creates conditions absolutely inconsistent with a fee-farm estate, that estate is gone. Now let me see how the conditions of a present tenancy apply. The alteration of the amount of rent payable, its variability at the end of every term of fifteen years, the provision against sub-division and sub-letting, the right of the landlord to enter for specific purposes, such as mining, quarrying, or cutting turf, may be inconsistent with the terms of the fee-farm grant, but still are not absolutely inconsistent with the existence of a fee-farm estate. But these are not the only conditions which spring from the fixing of a fair rent. When the tenant dies, he has either disposed of it by his will or he has not. If he has disposed of it to one person, the personal representative must assent to the bequest before the donee has a claim to be accepted as the tenant. If the tenant has disposed of it to more than one person, the personal representative must nominate some one of the donees to be accepted as tenant. If the tenant dies intestate and his estate devolves on more than one, again the personal representative must nominate one: sect. 3. Land Law (Ireland) Act, 1881. Now here are conditions

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2) [1912] 1 I. R. 12.

(3) [1895] 1 I. R. 328.

(4) [1901] 2 I. R. 445.

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absolutely inconsistent with a fee-farm estate. A personal representative has no privity whatever with such an estate, and his right to regulate its devolution is quite foreign to the nature of the estate. The only conclusion which I can legitimately draw from this is that a present tenancy and a fee-farm estate cannot exist side by side in the same subject-matter, and that where we have one we cannot have the other, and that once a present tenancy on the conditions of a present tenancy are called into existence the fee-farm estate disappears. This is conversion. But now comes the next question: can a limited owner convert? As a general proposition he cannot; but if a limited owner is given powers, the exercise of which involves conversion, then he must have power to convert unless there is an express condition attached to the power which precludes conversion. I will take the most obvious case in point. The Settled Land Act gives a tenant for life of real estate a power of sale. This involves conversion into money; but, to obviate the otherwise necessary consequences, there is an express provision in the Act that the money shall for all purposes be deemed to be land. Now it has not been denied that the tenant for life of a fee-farm estate has the powers conferred by the Redemption of Rent Act, 1891. He may fix a fair rent under it, and, if the necessary result is to convert the estate, he must be held to have had the power to convert. There is no provision in the Act that, notwithstanding the conversion, the new estate shall for the purposes of devolution be deemed to be the old estate. This may have curious results. For instance, a tenancy in tail, which may only exist in freehold lands, may be barred, and the estate of the tenant in tail may become an absolute estate; but such seems to be the inevitable result of the exercise of the power to fix a fair rent. This may shock the intellect of the old-fashioned real property conveyancer, but the Irish Land Code is essentially radical legislation, which has disturbed many conservative ideas.

On the whole, and acting on principle—the only guide I have when confronted by authorities which are contradictory—I must only come to the conclusion that John O'Connor's, junior, estate was that of a present tenant only, and not of a fee-farm estate, and passed to his next-of-kin, and not to his heir-at-law.

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Catherine Fitzpatrick, one of the next-of-kin of Mary O'Connor, appealed to the Court of Appeal in the Irish Free State (1) against so much of the order of the Master of the Rolls as declared that the lands of Mountlusk became converted into a chattel interest by the fixing of a fair rent thereon by Henry O'Connor, and that the same, on the death of Henry O'Connor, passed to the personal representative of John O'Connor, junior, as personal estate. The appellant asked for a declaration that

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the lands of Mountlusk were not converted into a chattel interest by the fixing of the fair rent thereon, and that the same on the death of Henry O'Connor, in the events which had happened, passed to Mary O'Connor as the heiress-at-law of Henry O'Connor.

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Hugh Mailey, an heir-at-law of Mary O'Connor, appealed against so much of the order of the Master of the Rolls as declared, 1, that the real estate of Henry O'Connor which passed to Mary O'Connor as his heiress-at-law passed on her death to her personal representative as personal estate; and, 2, that so much of the proceeds of sale of the land sold under the Settled Land Acts by Henry O'Connor as tenant for life, having devolved upon Mary O'Connor as his heiress-at-law, passed to her personal representative as personal estate. The appellant asked for a declaration that all the real estate and proceeds of real estate belonging to or devolving on Mary O'Connor passed on her death to her co-heirs-at-law.

Jellett K.C. (with him *Hamilton*), for the appellant, Catherine Fitzpatrick:—

The order fixing the fair rent was brought about by the action of the grantor, and did not alter the nature or devolution of the property so far as the grantee was concerned. [They cited *In re Rutledge's Estate* (1), *Irish Land Commission v. Magorian* (2), *Ledwith v. Ross* (3); and referred to the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57), sect. 1.]

Overend K.C. and *Murnaghan*, for Mary M. Waters, personal representative of John O'Connor, junior:—

By the fixing of the fair rent the estate in fee was converted into a chattel real interest; and the proceeds of the sale of the lands sold should be dealt with in the administration of the property of John O'Connor, junior. The fair rent and the statutory term begin from the gale next after the date of the application; and in this case the originating notice under the Redemption of Rent Act was on September 26th, 1893, during the lifetime of John O'Connor, senior. We rely upon the decision of *Holmes J.* in *Glenny v. Bell* (4).

M. Byrne, for Joseph M'Dermott.

Denning K.C. and *Sainsbury*, for Alphonsus M'Dermott.

J. Geoghegan, for three of the next-of-kin.

MacLoone K.C. (with him *Dickie K.C.* and *E. Kelly*), for Hugh Mailey, the appellant in the second appeal:—

Henry O'Connor having had only a life estate, could not effect a conversion of the real property: *In re Sturt* (5). In any event, the trusts upon which the testator, Henry O'Connor, directed conversion failed, and the property remained real estate

(1) [1895] 1 I. R. 328.

(3) [1910] 1 I. R. 151.

(2) [1901] 2 I. R. 445.

(4) [1898] 2 I. R., at pp. 245-6.

(5) [1922] 1 Ch. 416, at p. 431.

Appeal. during the lifetime of Mary O'Connor. As she died within
(I. F. S.) three months of the date of her will, her devises and bequests to
 1923. charitable institutions failed. In the circumstances the property
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v. reconvert.
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 GENERAL. *Jellett*, in reply.

MOLONY C.J. delivered the judgment of the Court in the first appeal as follows:—

This appeal was brought by Catherine Fitzpatrick, one of the next-of-kin of Mary O'Connor, deceased, against so much of the order of the Master of the Rolls, dated 1st May, 1923, as declares that the lands of Mountlusk became converted into a chattel interest by the fixing of a fair rent thereon by Henry O'Connor, and that the same, on the death of Henry O'Connor, passed to the personal representative of John O'Connor, junior, as personal estate.

It appears that John O'Connor, senior, held the lands of Mountlusk under a fee-farm grant, and by his will he bequeathed them to Henry O'Connor for life, with remainder, in the events which happened, to John O'Connor, junior. John O'Connor, senior, in the year 1893, served an originating notice under the Redemption of Rent (Ireland) Act, 1891, to redeem the fee-farm rent, and for an advance under the Land Purchase Acts of the whole capital sum payable by him for such redemption, and in case the grantors should not signify their consent to such redemption, he applied to the Court to be deemed a present tenant of the holding, and for an order fixing the fair rent to be thereafter paid for the same. John O'Connor, senior, having died, the proceedings were, by order of the Irish Land Commission, continued in the name of Henry O'Connor, the tenant for life under the will of John O'Connor, deceased; and the grantors not having consented to the redemption of the rent, the application to fix the fair rent was heard before a Sub-Commission on the 21st December, 1894. The rent was fixed at the sum of £52 10s. per annum, but on appeal was reduced to the annual sum of £42 10s.

The Master of the Rolls has held that the fixing of the fair rent converted the fee-farm estate into a chattel real estate, following in this respect the decision of the late Master of the Rolls, Sir Andrew Marshall Porter, in *M'Evoy v. M'Evoy* (1), and the decision of Mr. Justice Barton in *Temple and Lyons' Contract* (2). Decisions to the contrary effect had, however, been given by Mr. Justice Monroe in *In re Rutledge* (3), by the King's Bench Division in *The Irish Land Commission v. Magorian* (4), and by Mr. Justice Ross in *Ledwith v. Ross* (5).

(1) [1897] 1 I. R. 295.

(2) [1912] 1 I. R. 12.

(3) [1895] 1 I. R. 328.

(4) [1901] 2 I. R. 445.

(5) [1910] 1 I. R. 151.

I agree with the Master of the Rolls that it is impossible to reconcile these various decisions, and that the question can best be determined by considering whether the fixing of a fair rent creates conditions which may exist side by side with a fee-farm estate, or conditions absolutely inconsistent with it. It is only necessary to enumerate the conditions of a statutory tenancy, as has been carefully done by the Master of the Rolls in his judgment, to see how inconsistent they are with the continuance of a fee-farm estate; and I agree with him in his ultimate conclusion that a present tenancy and a fee-farm estate cannot exist side by side in the same subject-matter, and that once a present tenancy or the conditions of a present tenancy are called into existence the fee-farm estate disappears.

I also think that there is no doubt that such a conversion can be effected by a limited owner, when he is authorised by statute to do the thing which necessarily involves conversion.

Agreeing with the Master of the Rolls both in his reasons and conclusion, it follows that John O'Connor, junior, was a present tenant only, and that his interest in the tenancy upon his death passed to his next-of-kin, and not to his heir-at-law.

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In the second appeal—

MOLONY C.J. delivered the judgment of the Court as follows:—

This is an appeal from so much of the order of the Master of the Rolls, dated 1st May, 1923, as declares that the real estate of Henry O'Connor, deceased, which passed to Mary O'Connor as his heiress-at-law passed on the death of the said Mary O'Connor to her personal representative as personal estate, and in lieu thereof a declaration is sought that the real estate of Henry O'Connor, deceased, which passed to Mary O'Connor as his heiress-at-law, passed on her death to her co-heirs as realty.

The facts relating to this case will be found in the report of the decision of the Master of the Rolls on the further consideration of the Chief Clerk's certificate, *M'Dermott v. Attorney-General* (1).

The testator, Henry O'Connor, devised and bequeathed his real and personal property not thereby otherwise disposed of to his trustees and executors upon trust that they should call in and collect the same, and out of the moneys arising thereby, and all other moneys forming part of his estate, pay his funeral and testamentary expenses and debts and the legacies, other than specific legacies, thereby bequeathed. The objects for which conversion was to take place failed so far as the charitable

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legacies were rendered void by sect. 16 of the Charitable Donations and Bequests (Ireland) Act, 1844; but, as was pointed out by the Master of the Rolls, the trust for conversion still remained for the purpose of paying the funeral expenses, debts, and non-charitable legacies out of the mixed fund. There was thus only a partial failure of the trusts, and the case seems to be governed by *In re Richerson, Scales v. Heyhoe* (1), where it was held by Chitty J. that where real estate is devised upon trust for conversion into personalty to be held upon trusts which in the result partially fail, the proceeds of the lands sold and land, if any, unsold both result to the heir as personal estate. Mr. Justice Chitty founded his judgment upon the well-known cases of *Ackroyd v. Smithson* (2), *Jessop v. Watson* (3), *Attorney-General v. Lomas* (4), and *Curteis v. Wormald* (5); and I fully agree both with the decision and the reasons given by the learned Judge for it.

Admitting the authority of *Scales v. Heyhoe* (1), Mr. MacLoone has endeavoured to argue that although conversion took place, there was in the circumstances of the present case an equity to reconvert. A somewhat similar argument was addressed to Jessel M.R. in *Curteis v. Wormald* (5), but was very effectively disposed of by him in the following words: "If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statutes of Distribution as next-of-kin . . . Then the next question which arises is, how does the heir-at-law in the first case or the next-of-kin in the second take the undisposed of interest? The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate and dies, there is no equitable reversion as between his real and personal representative, and consequently his executor takes it as part of his personal estate. On the other hand, if the next-of-kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death; it will go to the devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate." This case went to the Court of Appeal, and the judgment of Jessel M.R. was affirmed and reinforced by a luminous judgment by James L.J., in which he restated the principle in the clearest language. He said (*Curteis v. Wormald* (5)): "Where you trace property into a man there is no equity between his different classes of representatives as to altering the

(1) [1892] 1 Ch. 379.

(2) 1 Browne's Ch. Cases, 503.

(3) 1 M. & K. 665.

(4) L. R. 9 Ex. 29.

(5) 10 Ch. D. 172, at pp. 173, 178.

position in which that property is. If it is money arising from the sale of land, it remains money, that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next-of-kin have no right to have it reconverted into money." It is hopeless for Mr. MacLoone to argue against the judgments of these two great masters of equity; and the appeal fails. Of course, if Mr. MacLoone could have shown that the real estate was after conversion to be held upon trusts which wholly failed, the result would be different, because in such event there would be no conversion at all: see *Re Hopkinson, Dyson v. Hopkinson* (1).

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Solicitor for the appellant, Catherine Fitzpatrick: *A. Lane-Joynt*.

Solicitors for Mary Anne Waters: *Rooney & Co.*

Solicitor for Joseph M'Dermott: *E. Mooney*.

Solicitors for Alphonsus M'Dermott: *Sainsbury & Co.*

Solicitor for Hugh Mailey: *Charles S. Doyle*.

Solicitors for the three next-of-kin: *William Mooney & Son*.

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See VENDOR AND PURCHASER.

ANCILLARY RIGHTS—Contract for sale of growing timber—Removal—Use of roads and passes [55]
See TIMBER—SALE OF.

BRIDGE — INCREASED TRAFFIC — *Statutory duty to keep bridge in good and substantial and serviceable repair, and in an efficient state—Standard of repair—*27 Geo. 2, c. iii, sects. 1 to 8; 19 & 20 Geo. 3, c. xxxii (*Ir.*), sect. 1; 54 Geo. 3, c. ccxxxi, sects. 2 and 6; 6 & 7 Vict. c. civ (*Local*), sects. 21, 24, 62, 63, 64, 65, 66, 67, 144, 159; 36 Vict. c. lxxv, sect. 2—*Ulster Canal and Tyrone Navigation Act, 1888 (51 & 52 Vict. c. cxxxvii), sect. 8.]* A private Act of 27 Geo. 2, c. iii, empowered a corporation to make a canal; under subsequent Acts large sums of money were subscribed by different persons for the purpose of carrying on and improving the navigation of the said canal; and by Act of Parliament, 54 Geo. 3, c. ccxxxi (*Local*), all such persons were incorporated in a company of undertakers, and all the property of the said canal was vested in the said company of undertakers. By further Act of Parliament, 6 & 7 Vict. c. civ (*Local*), all the property, rights, and liabilities of the said company of undertakers were transferred to and vested in the defendants. By sect. 62 of 6 & 7 Vict. c. civ, it was provided that the company should "maintain and keep all bridges, roads," etc., belonging to the canal, and "all works to be thereafter executed for the improvement thereof in good and substantial and serviceable repair, and in

BRIDGE—*continued.*

an efficient state for all the purposes thereof, and of the traffic on the same respectively." The canal was duly completed, and the company made bridges over the canal in accordance with the Acts of Parliament. It was admitted that a bridge erected under the said Acts prior to the year 1835 had for several years prior to the year 1919 not been adequate to carry the ordinary traffic in the district as increased and varied in character, particularly as to motor traffic. In an action by the Attorney-General, at the relation of the County Council, against the company for a declaration that they were liable to keep the bridge in good and substantial and serviceable repair, and in an efficient state, so that it might be sufficient to bear the present-day ordinary traffic of the district which might reasonably be expected to pass over it: *Held*, reversing the judgment of Wilson J., that the company were only liable to keep the said bridge in such good and substantial repair as sufficed for the traffic thereon in the year 1843. *The Attorney - General (Down County Council) v. The Lagan Navigation Co.* [APP. (N.I.) 91]

CASES — *Christie v. Gosling* (L.R. 1 H.L. 279), distinguished ... 137
See HEIRLOOMS.

— *Egan v. Macready* ([1921] 1 I.R. 265), distinguished ... 5
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— *Emperor of Austria v. Day* (3 De G. F. & J. 253), applied 112
See CLUB.

CLUB—ALTERATION OF RULES—JURISDICTION OF COURT TO CONSIDER VALIDITY — *Property and rights of members not affected—Golf club.* The P. club was established some time prior to 1888 for the purpose of playing golf. The original rules neither

CLUB—*continued.*

permitted nor prohibited the playing of golf on the links on Sundays; but in the year 1895 a code of rules was adopted, one of which provided that golf should not be played on the links on Sundays. These rules prescribed that no rule should be repealed or altered or new rule made except at a general meeting, after notice of the proposed change had been sent to each member. Rule 37 prescribed that no future motion to open the links for play on Sundays should be passed unless by a majority of two-thirds of those present and voting. In July, 1922, new rules were passed at a special general meeting which amounted to an entire repeal of the old rules; and in August, 1922, a resolution was passed by a majority of less than two-thirds permitting the playing of golf on Sundays, subject to such rules and regulations as the council might consider expedient. *Held*, applying the principle of *Emperor of Austria v. Day and Others* (3 De G. F. & J. 253), inasmuch as the rights or privileges of members of the club had not in any way been affected, nor the property of the club in any way injured, that the Court had no jurisdiction to consider the legal validity of the rules of the club, nor to grant an injunction against the commission of acts merely criminal or merely illegal; and *held* further, on the evidence that notice of the proposed change was properly given, and that the repeal of rule 37 (which required a two-thirds majority) did not itself require a two-thirds majority. *Held* also, that if playing of golf on Sundays be contrary to statute 7 Wm. 3 (1r.), c. 17, sect. 3, and a criminal offence, the Chancery Division is not the proper tribunal to determine that question. *Watt and Others v. MacLaughlin and Others*

[Ch. Div. (N.I.), WILSON J. 112]

CONDITION—Uncertainty ... 16

See WILL—CONDITION.

CONVERSION — *Fixing of judicial rent—Fee-farm grant—Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 57)—Limited owner—Land devised in trust for sale—Partial failure of trusts—Intestacy—Real or personal estate.* A judicial rent was fixed by order of the Land Commission in respect of lands held under a fee-farm grant. *Held* by the court of Appeal (affirming O'Connor M.R.), that the

CONVERSION—*continued.*

fixing of the judicial rent converted the fee-farm estate into a chattel real estate, and that such a conversion could be effected by a limited owner. H. O'C. by his will devised and bequeathed all his real and personal property not thereby otherwise disposed of to his trustees and executors upon trust that they should sell, call in, and collect the same, and out of the moneys arising thereby, and all other moneys forming part of his estate, pay his funeral and testamentary expenses and debts and the legacies, other than specific legacies thereby bequeathed. He bequeathed pecuniary legacies to a number of charitable institutions, and directed that they should not be paid till after the death of his sister, M. O'C. He bequeathed to her for life the net income of all his residuary real and personal estate, and all investments representing the same. He further devised and bequeathed, after payment of the charitable legacies, the net residue of his property on his sister's death upon trust for such of the charitable institutions named in his will as his trustees should select, and they appointed the residue among certain charitable institutions mentioned in equal shares. H. O'C. died within three months from the date of his will, leaving M. O'C. his sole next-of-kin and heiress-at-law him surviving. M. O'C. by her will gave certain legacies, and devised and bequeathed the residue of her property, real and personal, in equal shares to the charitable institutions named in her brother's will. She also died within three months from the date of her will. In former proceedings it was held that the charitable legacies were rendered void by sect. 16 of the Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97). *Held* by the Court of Appeal (affirming O'Connor M.R.), that where real estate is devised upon trust for conversion into personalty to be held upon trusts, which in the result partially fail, the proceeds of the lands sold and land, if any, unsold, so far as the same are applicable to trusts which have failed, both result to the heir as personal estate; and accordingly that the real estate of H. O'C., and also the proceeds of the sale of land previously disposed of by him, which passed to M. O'C. as his heiress-at-law, on her death passed to her personal representative as personal estate. *McDonnott v. Attorney-General* (No. 2) M.R., APP. (I.F.S.) 142, 148

COSTS—Committee of Lunatic—
Priority of maintenance to 108

See LUNACY.

ESTATE DUTY—Liability of freehold registered lands specifically devised to ... 35

See REVENUE—ESTATE DUTY.

FEE-FARM GRANT—Redemption of Rent Act, 1891—Fixing of judicial rent—Limited owner [142, 148

See CONVERSION.

GOLF CLUB—Jurisdiction of Court to consider validity of alteration in rules ... 112

See CLUB.

HABEAS CORPUS—STATE OF WAR—MILITARY COURTS—*Irish Free State (Agreement) Act, 1922* (12 Geo. 5, c. 4)

—*Interpretation—Powers of Irish Provisional Government—Jurisdiction.*] C. was arrested and charged with committing an offence "in that he on the 10th day of November, 1922, without proper authority, was in possession of an automatic pistol when apprehended by a party of National forces." This charge was investigated by a military Court assembled at Portobello Barracks, but no sentence was promulgated. On application for a writ of habeas corpus: *Held*, that the writ must be refused, as a state of war being proved, the military, to whom the duty of repelling force by force was committed, were the sole judges of how it should be exercised. *Egan v. Macready* ([1921] 1 I.R. 265) distinguished. *R. (Childers) v. Adjutant-General of the Forces of the Irish Provisional Government* ... M.R. 5

HEIRLOOMS—BEQUEST OF JEWELS TO DEVOLVE AS—*Vesting in tenant in tail attaining twenty-one—Tenant in tail by descent included—Rule against perpetuities.*] Under a will jewels the absolute property of the testator were bequeathed to trustees of a settlement previously made, subject to a life interest, upon trust to permit the same to be enjoyed and devolve, with certain freehold hereditaments, under the settlement; and, subject to the life interest, "to devolve and be enjoyed as heirlooms with the testator's real estate, but so that the same shall not vest in any person becoming tenant in tail male or in tail unless he shall attain the age of twenty-one, but on

HEIRLOOMS—*continued.*

his death under that age shall devolve as if they formed part of the said estates." *Held*, that inasmuch as the limitation of the jewels to tenants in tail in succession, with a gift over in the event of a tenant in tail dying under twenty-one years, included the whole class of tenants in tail on whom the lands were settled, and therefore included tenants in tail by descent, the bequest was invalid as contravening the rule against perpetuities, and that the jewels passed to the residuary legatee absolutely. *Christie v. Gosling* (L.R. 1 H.L. 279) distinguished. *Gormanston v. Gormanston* ... M.R. 137

HUSBAND AND WIFE—ADVANCEMENT—*Joint account—Deposit receipt—Death of husband intestate—Deposit receipt excluded in estimating the wife's distributive share.*] A husband placed a sum of money on deposit receipt in the joint names of himself and his wife, and died intestate and without issue. The widow, having been found to be a person of unsound mind, a question arose whether in estimating the amount of her distributive share of her husband's assets she was bound to give credit for the sum which she received as survivor in the joint account. *Held*, that the widow was entitled to the amount of the deposit receipt and to her charge of £500 under the Intestates' Estates Act, 1890, and her one-half of his residuary personal estate. *In re Hood* [IN LUNACY (I.F.S.) 109

IMPROVEMENTS made by tenant for life—Recoupment out of capital money ... 1

See TENANT FOR LIFE AND REMAINDERMAN.

INCOME—Gift of by will—No appropriation of corpus—Intestacy ... 78

See WILL. 3.

INCOME TAX—Deduction of from interest on legacies ... 104

See PRACTICE—ADMINISTRATION.

INTEREST ON LEGACIES—Deduction of income tax from ... 104

See PRACTICE—ADMINISTRATION.

JUDICIAL RENT—Fixing of—Fee-farm grant ... 142, 148

See CONVERSION.

LANDLORD AND TENANT—COVENANT FOR RENEWAL or agreement to negotiate for new lease.] Lessees entered into possession of certain premises under a lease for a term of twenty-five years, with a covenant to give the lessees a further lease for the remainder of the lessors' term on sending a notice in writing to that effect to the lessors at least twelve months previous to the end of the term. The lease also contained a further covenant entitling the lessees to take a lease of certain other premises should they elect to do so within six months of the execution of the original lease. They did so elect, and entered into possession of these latter premises subject to a precisely similar covenant for the extension of the lease. *Held*, affirming *Wilson J.*, that the lessees were entitled to new leases for the residue of the terms of the lessors in the premises. *Bernard Hughes, Ltd., v. Hughes, Dickson, & Co., Ltd.*

[*CH. D. (N.I.)*, *WILSON J.* 121

LAND PURCHASE ACTS—REDEMPTION OF RENT—VARIABLE RENT—Non-publication of corn averages—Impossibility to determine the amount of variation—Resumption of publication of corn averages—Tithe Rentcharge (Ireland) Act, 1900 (63 & 64 Vict. c. 58), sects. 2 and 3—*Irish Land Act*, 1903 (3 Ed. 7, c. 37), sect. 90.] Section 90 of the *Irish Land Act*, 1903 (3 Ed. 7, c. 37), enacts that:—Where, by reason solely of the non-publication of the average prices of produce in the "Dublin Gazette," it has become impossible in the absence of other provision to determine the amount by which any variable rent, calculated upon an average of prices, should be varied, sections 2 and 3 of the *Tithe Rentcharge (Ireland) Act*, 1900, shall apply as from the commencement of this Act in the case of such variable rents, and the words "tithe rentcharge" in the said sections shall be deemed to include any variable rent as aforesaid. *Held*, that the section applies notwithstanding that publication of prices has subsequently been resumed. *Johnston's Estate*

[*WYLIE J.* 125

LIMITED OWNER—Fee-farm grant—Fixing of judicial rent 142.

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See CONVERSION.

LUNACY — **INSOLVENT ESTATE** — Claims for maintenance and committee's costs—Priority.] A person of unsound mind having died insolvent, arrears due for maintenance to the institution where he had been kept were allowed after debts due to the Crown, and in priority to the taxed costs of his committee. *In re Maguire, deceased* ... [*IN LUNACY (S.I.)* 108

MAINTENANCE OF LUNATIC — Priority of to costs ... 108
See LUNACY.

MEMORANDUM—Statute of Frauds [127
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MILITARY COURTS — Jurisdiction of where state of war existing [5
See HABEAS CORPUS.

OPTION TO PURCHASE partnership—Expiration of term 68
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PARTNERSHIP — **OPTION TO PURCHASE** — Expiration of term — Continuance of business without fresh article—*Partnership Act*, 1890 (53 & 54 Vict. c. 39), sect. 27, sub-s. 1 — Death—Pre-emption clause—Inconsistent alternative — Application to partnership at will.] A and B entered into a partnership deed by which they agreed to carry on business for a period of ten years. One of the clauses in the deed provided that in the event of A predeceasing B during the term of ten years, B should be entitled to purchase the share or interest of A in the partnership assets, or if he should not so purchase same he should be entitled to have A's share of the partnership assets continued in the business for the remainder of the period of ten years; but the personal representatives of A or their assigns were not to be entitled to interfere with or take any part in the management of the business, but they were to be entitled to A's share of the partnership profits, and liable to bear his share of the losses as he would have done if he had lived. After the expiration of the period of ten years in May, 1919, both parties continued to carry on the business as a partnership without entering into new articles and without making any fresh arrangement. On April 5th, 1921, A died, and the survivor B sought to purchase the share of the deceased partner in the

PARTNERSHIP—*continued.*

assets. *Held* (affirming *O'Connor M.R.*), that the whole clause read together applied only during the period of ten years, and was inapplicable to a partnership at will. When alternative rights are given in an instrument, and one of these alternatives is obviously inapplicable to a partnership at will, the person cannot claim the benefit of the other alternative. *Murphy and Carew v. Power* ... *M.R.* 68

PERPETUITIES—Rule against 137

See HEIRLOOMS.

PILOTAGE — Compulsory — Statutory duty to enforce ... 38

See STATUTORY DUTY.

PRACTICE — ADMINISTRATION

—DEDUCTION OF INCOME TAX *from interest on legacies.*] Executors are entitled to deduct out of interest payable to legatees income tax assessed on such interest at the current rate. *Jones, deceased; Hamilton v. Linaker* ... *CH. D. (I.F.S.)* 104

PRINCIPAL AND AGENT—RIGHT

OF AN AGENT TO MAKE PROFIT *out of repairs effected by him while acting for his principal.*] The defendants, who were house-agents, acted as agents for the plaintiff to collect the rents and to do the necessary repairs to her property. The defendants were originally appointed in 1908, and up to 1911 had the repairs executed by outside-contractors. In 1911 the defendants opened their own repairs yard, did the repairs themselves, and charged the "usual trade prices," which included a profit. Quarterly statements of account were regularly furnished by the defendants to the plaintiff from the commencement of the agency. The plaintiff claimed to have the accounts reopened on the ground that she had been charged a secret profit by the plaintiffs on the repairs executed by them in addition to their commission. *Held*, that the plaintiff knew and approved of the repair work being executed by the defendants, that the defendants had made sufficient disclosure to the plaintiff that they were charging a profit, that the charges were not shown to have been unfair or unusual, and that therefore the plaintiff was not entitled to have the accounts reopened. Decision of *Wilson J.* affirmed. *Sherrard v. Barron* *APP. (N.I.)* 21

PROFIT—Right of agent to make out of repairs while acting for principal—Disclosure ... 21
See PRINCIPAL AND AGENT.

RENEWAL — COVENANT FOR —

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REPAIR — Standard of — Bridge —

Increased traffic ... 91

See BRIDGE.

REVENUE — ESTATE DUTY —

WHETHER PAYABLE OUT OF FREEHOLD LANDS OR RESIDUARY PERSONAL ESTATE —*Will—Registered land—Local Registration of Title (Ireland) Act (54 & 55 Vict. c. 66), sect. 47—Finance Act, 1894 (57 & 58 Vict. c. 90), sect. 9, sub-s. 1; sect. 8, sub-s. 2—“Property passing to the executor as such”—Bequest of farm and all stock thereon—Meaning of “stock.”*] On an application to determine (1) whether estate duty was payable in respect of freehold registered land by the devisees and owners of the testator's freehold lands, or by the residuary legatees, and (2) as to meaning of the word "stock" in a bequest of farm and all stock thereon: *Held*, that the freehold registered lands specifically devised were primarily liable to a rateable part of the estate duty in exoneration of the residuary estate. *Held* also, that under the devise of a farm "and all stock thereon" 286 barrels of oats stored on the farm passed to the devisee of the farm. *In re Drew; Marry v. Drew* *M.R.* 35

RULES OF GOLF CLUB—Juris-

diction of Court to consider validity ... 112

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SALVAGE—Payment by tenant for

life—Recoupment out of capital moneys ... 1

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growing timber—Limit on user [55

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- 7 Wm. 3 (Ir.), c. 17 ... 112
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- 27 Geo. 2, c. iii ... 91
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- 19 & 20 Geo. 3, c. xxxii (Ir.) 91
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- 54 Geo. 3, c. cxxxix ... 91
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- 1 Vict. c. 26, s. 24 ... 88
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- 6 & 7 Vict. c. civ ... 91
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- 51 & 52 Vict. c. cxxxvii ... 91
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- 54 & 55 Vict. c. 57 142, 148
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- 54 & 55 Vict. c. 66, s. 47 ... 35
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- 57 & 58 Vict. c. 90, s. 8, sub-
s. 2; s. 9, sub-s. 1 ... 35
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- 63 & 64 Vict. c. 58, ss. 2 and 3 [125
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- 3 Ed. 7, c. 37, s. 90 ... 125
See LAND PURCHASE ACTS.
- 2 & 3 Geo. 5, c. 31 ... 38
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- 10 & 11 Geo. 5, c. civ ... 38
See STATUTORY DUTY.
- 12 Geo. 5, c. 4—Irish Free
State (Agreement) Act, 1922 [5
See HABEAS CORPUS.

STATUTES OF LIMITATION —
POSSESSION AS ADMINISTRATRIX —
*Widow and infant children remaining
in possession—Action by child who
had come of age and obtained a grant
of administration de bonis non.]*
J. M'A., who was possessed of a
licensed public-house and a farm of
land, died intestate on 18th January,
1892. He left him surviving his widow
and several daughters. The widow
obtained a grant of letters of ad-
ministration to his estate on 23rd
March, 1892, and continued to trade

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and to work the farm until her death
on 13th April, 1921. Four of the
children remained on in possession
with their mother. Two months after
the death of the widow a daughter
Mary, who had married and left the
farm in her father's lifetime, took out
a *de bonis non* grant to her father's
estate, and instituted the present
action for administration of his estate.
Mary died before the action could be
tried. By her will Mary left all her
property to her two daughters, and
appointed them her executrices. Both
these daughters were made plaintiffs
by revivor. E., another daughter of
J. M'A., the deceased, extracted a
further grant of administration *de
bonis non* to the estate of her father,
and she was also made plaintiff by
revivor. The defendants were the
executors of the widow and T., a
daughter of J. M'A., who was a minor
when J. M'A. died, but had attained
age and had continuously remained in
occupation of the farm, and to whom
her mother had bequeathed all her
property, subject to a legacy of £60
to another daughter R. *Held*, that the
possession of the widow should be
attributed to her character as ad-
ministratrix, and that although she
had entered into possession on behalf
of herself and all the next-of-kin, she
was entitled to the benefit of the Law
of Property Amendment Act, 1860
(23 & 24 Vict. c. 38), sect. 13, and
that the action had rightly been dis-
missed by Wilson J. *M'Alea, de-
ceased; Mallon v. M'Alea*

[APP. (N.I.) 30

STATUTORY DUTY — FAILURE TO
PERFORM — *Public body — Summary
procedure—Right of action—Pilotage
—Pilotage Act, 1913 (2 & 3 Geo. 5,
c. 31); Pilotage Order Confirmation
(No. 2) Act, 1920 (10 & 11 Geo. 5,
c. civ)—Compulsory pilotage—Contra-
vention by shipowner—Duty of pilot-
age authority to licensed pilots.]*

By the Pilotage Act, 1913 (2 & 3 Geo. 5,
c. 31), the employment of pilots
licensed by the port authority, and
payment to that authority of the ap-
propriate pilotage dues, were made
obligatory in the case of all vessels
entering, leaving, or making use of the
port and harbour of D., other than
vessels excepted under that Act, and
vessels navigated by masters or mates
licensed as pilots by the port
authority, the master of any vessel
bound by the compulsory pilotage

STATUTORY DUTY—*continued*.

enactments who refused to take the services of a licensed pilot when tendered being liable to a penalty on summary conviction. The defendants, the pilotage authority, received the pilot fees, which were pooled and paid partly to the plaintiffs, who were licensed pilots, and partly to a fund created for the plaintiffs' benefit called the pilots' benefit fund. A shipowner L., who used the port, and whose vessels came within the compulsory pilotage regulations, refused to take the services of the plaintiffs when tendered, and refused to pay to the defendants the pilotage fees which would have been payable if the plaintiffs' services had been accepted. The defendants did not prosecute the masters of these vessels, nor take any steps to recover the pilotage fees. In an action by the plaintiffs for a declaration that the defendants had failed in their statutory duty and for damages: *Held*, that the procedure for penalty for breach of the pilotage enactments was not exclusive, that there was a statutory duty cast upon the defendants to enforce compulsory pilotage, and that they had failed to perform that duty in the case of the above-mentioned shipowner to the prejudice and damage of the plaintiffs. For the breach of this duty the defendants were held liable to the plaintiffs in damages to the amount of pilotage fees which could have been earned by the plaintiffs had licensed pilots been carried by L.'s vessels for the six months prior to action brought. *Hughes and Others v. Dundalk Harbour Commissioners* ... 38

TENANT FOR LIFE AND REMAINDER-MAN — RECOUPMENT OF EXPENDITURE BY TENANT FOR LIFE—*Improvements*.—*Salvage*—*Recoupment out of capital moneys*.] To entitle a tenant for life to recoupment out of capital moneys of sums expended by him on improvements, such expenditure must be in the nature of salvage payments, necessarily made to save the estate from actual danger of destruction; for example, money expended to prevent an immediate breach in a sea-wall and consequent flooding. Money spent on ordinary improvements or current maintenance does not come within the rule; and it is immaterial that the Estates Commissioners insist on such improvements as a condition precedent to a sale under the Land Purchase Acts. *In re Cobden's Estate* ... 1

TENANT IN TAIL by descent—Bequest of jewels to devolve as heirlooms—Rule against perpetuities ... 137

See HEIRLOOMS.

TIMBER, SALE OF — *Growing timber* — *Ancillary rights* — "Use of all roads and passes" for removal of timber—*Licence to erect sawmill*—*Implied rights* — *Manufacture of sleepers, etc.* — *Time for removal of timber*.] Under a contract for the sale by the owner of land of the timber growing on it, the purchaser was given "the use of all roads and passes" for the removal of the timber, which was to be effected within a period of five years. Verbal permission was given by the vendor to the purchaser to erect two sawmills on the lands to facilitate him in carrying out the contract. *Held* (affirming Powell J.), that the purchaser was not entitled to use a sawmill erected by him on the lands for the purpose of manufacturing articles for sale, and that the purchaser was not entitled to remove the timber by a mode of traction which so damaged the roads on the vendor's land as to make them incapable of being used for the ordinary purposes of the owner's dwelling-house and farm. *Rudd v. Rea*

[APP. (I.F.S.) 55]

TRUST FOR SALE of realty — Partial failure of—Devolution —Resulting trust to heir as personal estate ... 142, 148

See CONVERSION.

UNCERTAINTY — Condition subsequent ... 16

See WILL. 1.

VARIABLE RENT—Non-publication of corn averages ... 125

See LAND PURCHASE ACTS.

VENDOR AND PURCHASER — SPECIFIC PERFORMANCE—MEMORANDUM IN WRITING — *Signature of agent lawfully authorised*—*Statute of Frauds* (7 Wm. 3 (Ir.), c. 12, sect. 2).] B., the plaintiff's agent, agreed verbally with R. to sell to R. certain freehold lands for the sum of £10,000. No formal agreement was entered into, but R. entrusted to his solicitor the carrying out of the contract. On the day this agreement was made the vendor's solicitor wrote to the purchaser's solicitor: "B. informs us that he has agreed with R. for the

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sale to him of his holding at — in fee-simple for the sum of £10,000. Under these circumstances we think it would be possible to reasonably limit the title." On the next day purchaser's solicitor, in acknowledging the letter, proceeded: "The simple agreement arrived at herein appears in the first part of your letter, and I suggest that we can dispense with any further agreement." *Held*, that this letter was a note or memorandum signed by R.'s agent, lawfully authorised, sufficient to satisfy the Statute of Frauds. *Cloncurry (Lord) v. Laffan and Others* ... M.R. 127

WAR—State of—Jurisdiction of military Courts ... 5

See HABEAS CORPUS.

1. WILL — CONDITION — UNCERTAINTY—"Come to live."] A testator bequeathed the residue of his property to his brother Alexander, at present residing in I., New Zealand, provided that he or any of his sons came to live at M. within one year after the testator's death, and in the event of Alexander or any of his sons not so coming to live at M., he bequeathed said residue to his brother Aaron. *Held*, that the condition as to residence was too vague to be enforced, and was void for uncertainty, and that Alexander was entitled to the residue of the estate absolutely. *In re M'Cleary; Moffat v. M'Cleary*

[CH. D. (N.I.) 16

2. WILL—"FALSA DEMONSTRATIO"—*Bequest of shares — After-acquired shares — General gift — Wills Act (1 Vict. c. 26), sect. 24.*] A testatrix bequeathed to her niece E. B. "all the shares in any company I have that are absolutely my own," and specifically named certain shares, but was possessed of others which she did not name. She subsequently became entitled absolutely as survivor to other

WILL—*continued.*

shares which had stood in the joint names of herself and her sister, on the death of the latter. *Held*, 1, that the enumeration of certain shares in the will did not cut down the previous bequest; 2, that E. B. under said bequest was entitled only to the shares testatrix was possessed of at the date of the execution of the will. *In re White, deceased; Blake v. Blake*

[M.R. (I.F.S.) 88

3. WILL—GIFT OF INCOME *for life and discretionary trust for application of corpus from time to time for benefit of legatee—No appropriation of corpus—Death of beneficiary — Intestacy.*] Testator devised and bequeathed all his property, real and personal, to trustees upon trust for conversion, and after payment of his debts and funeral and testamentary expenses, and certain pecuniary legacies, upon trust to invest the proceeds, and to apply the income arising therefrom, and, if necessary, the corpus and capital thereof, towards the support and maintenance of his cousin L. R. L. R. died about three months after the testator, no payment or appropriation of any part of the corpus having been made to her by the trustees. The will did not contain any residuary clause. *Held*, affirming the judgment of the Court of Appeal for Northern Ireland, that the entire corpus passed as on an intestacy to the next-of-kin of the testator. *Mill, deceased; Hughes and Watt v. M'Naull and Mill*

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WILL — WORDS — "And all stock thereon" ... 35

See REVENUE—ESTATE DUTY.

— "Come to live" ... 16

See WILL. 1.

WORDS — "Property passing to the executor as such" ... 35

See REVENUE—ESTATE DUTY.

THE END.



